IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-208

ISAAC KAPLAN d/b/a INSJARL REALTY Co., for an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Appellant,

—against—

JEROME PRINCE, FRANK A. BARRERA, IRVING H. STOLZ, PAUL A. VICTOR, MARC A. GOODMAN, JACOB B. WARD, MARTY MARKOWITZ & ROBERT C. WEAVER, being the members of the CONCILIATION AND APPEALS BOARD, and the HOUSING AND DEVELOPMENT ADMINISTRATION,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the New York Supreme Court, Appellate Division, First

Department, Order dated February 1, 1979, affirming without opinion the Supreme Court, New York County judgment entered July 14, 1978, denying Appellant's Article 78* application and dismissing the petition. The Court of Appeals denied Appellant leave to appeal by judgment entered May 10, 1979. Appellant submits this Statement to show that the United States Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The Court of Appeals opinion dated May 10, 1979 (A-1)** has not yet been reported. The Appellate Division, First Department opinion, dated February 1, 1979, (A-6) is reported at 67 App. Div. 2d 1110, 412 N.Y.S.2d 717.

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* Article 78 of the New York State Civil Practice Law and Rules, in the nature of mandamus.

** Appendix references are cited by "A" and page numbers.

The trial court decision dated May 16, 1978* (A-13) and the resulting judgment filed July 14, 1978 (A-8), dismissing Appellant's Article 78 Petition, are unreported.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 10, 1979. A notice of appeal was filed with the Supreme Court, N.Y. County, August 8, 1979, ~~in ninety days of that date~~. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §1257(2)** and §2101(c).

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* N.Y.L.J. May 19, 1978, p.7, Col. 1 (Sup. Ct. N.Y. Co., Shainswit, J.)

** If the proper mode of review of this Appeal or any question presented herein is by petition for certiorari, Appellant respectfully requests that this Statement be regarded and acted on as a petition for writ of certiorari and as if duly presented to this Court at the time the Appeal was taken.

This appeal is properly before this Court under the principle enunciated in Minneapolis, St. Paul, and Sault Ste. Marie Railway Co. v. Rock, 279 U.S. 410 (1929).

Questions Presented

1. Whether rent control laws are an unconstitutional taking without just compensation to the landowner in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Whether a rent control law violates the United States Constitution, Article I, Section 10, (as applied), and the Fifth and Fourteenth Amendments (on its face and as applied) because:

(a) the law depends upon the existence of an emergency which did not exist at the time of the law's enactment and does not presently exist;

(b) the 5% or less vacancy rate standard for an "emergency" is

undefined, illusory and self-perpetuating;

(c) the law applies indiscriminately to all residential dwellings without distinguishing classes of housing where the rental and vacancy rates may be significantly higher;

(d) the law as applied to an owner, has required him to restore a service which, under the owner's leases with his tenants, is optional and would have had no effect on the rental rate?

3. Whether there is a denial of due process when:

(a) an administrative hearing officer does not prepare a detailed report in violation of the administrative tribunal's own rules;

(b) the administrative tribunal does not hear the testimony or listen to an available tape recording, no transcript of the testimony is made, no hearing

officer's report is prepared and the agency is not otherwise adequately informed of the proceeding?

4. Whether due process requires that a party to an administrative hearing be furnished with a draft opinion which, if adopted by the tribunal, will become the decision of the agency?

5. Whether an administrative agency's delay of two years and three months between hearing and decision is a denial of due process?

Statutes, Rules and Regulations Involved

New York City Administrative Code, Chapter 51, Title YY, the New York City Rent Stabilization Law (the "Statute" hereinafter),* §§8621, 8622, 8623, and 8625

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* §§YY51-1.0, YY51-3.0, YY51-3.1, YY51-4.0, YY51-6.0, a Savings Provision and the Powers of the Conciliation and Appeals Board are set forth at A-56-91.

of the New York State Unconsolidated Laws (A-92-100) known as the Emergency Tenant Protection Act of 1974, ("the Enabling Act" hereinafter) Sections 1, 2(m), 7, 8, 34, and 62 of the Amended Code of the Rent Stabilization Association of N.Y.C., Inc., (the "Code" hereinafter) (A-104), Rule 7 of the Rules of the Conciliation and Appeals Board (the "Rules" hereinafter). (A-118)

Constitutional Provisions Involved

United States Constitution:

> Article 1, Section 10, in part: "No State shall...pass any...Law impairing the Obligation of Contracts..."
>
> Fifth Amendment, in part: "No person shall...be deprived of life, liberty, or property, without due process of the law;"
>
> Fourteenth Amendment, in part: "No State shall...deprive any person of life, liberty, or property, without due process of law..."

New York State Constitution:

> Article One, Section Six, in part:

"no person shall be deprived of life, liberty, or property without due process of law."

The Rent Control Statutes

Rent control began in New York State in 1943. Since 1962, rent control has been under New York City's auspices.* Rent control only covered buildings built before 1947.

The New York City Council enacted "rent stabilization" on May 12, 1969 to cover the approximately 400,000 dwelling units built between 1947 and 1969.** In 1971, the New York State Legislature provided for decontrol of all voluntarily vacated rent control or rent stabilized apartments. In 1974, the Enabling Act

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* Title Y, New York City Administrative Code, Chapter 51.

** In multiple dwellings having 6 or more residences.

permitted rent stabilization to continue as to all previously stabilized apartments, all previously destabilized or vacancy decontrolled apartments, all rent controlled apartments thereafter vacated and dwelling units built between 1969 and 1973. Approximately 450,000 additional dwelling units became rent stabilized. In 1979, rent stabilization was once again continued. There are now approximately 800,000 rent stabilized dwelling units in New York City. The number is steadily growing as rent controlled apartments become vacant and are then stabilized.

Statement of the Case

The Factual Background

Appellant is the owner of a seventeen-story luxury apartment building located at 750 Park Avenue at 72nd Street in the heart of the high-rent district of Manhattan. The building's 68 residential apartments

are all rent stabilized. Built in 1955, the building is maintained in a style consistent with a luxury building.

The Rent Stabilization Association of N.Y.C., Inc. (the "Association") is a private membership association of owners of dwelling units covered by the Statute and the Code.*

The Statute empowers Appellee Conciliation and Appeals Board to receive and act upon complaints from tenants and certain applications by owners. (A-70)

Toward the end of 1974 and during the first six months of 1975,escalating costs, extraordinary expenses and a high

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* The Association is actually quasi-public. The thesis that membership is voluntary is untrue: a landlord is faced with the choice of maintaining membership in the Association and obeying the ukases of its executive arm, the Conciliation and Appeals Board (Appellee herein) or coming within the pythonic embrace of rent control.

vacancy rate resulted in Appellant's costs exceeding his income from the building. Seeking a statutory "hardship" rate increase was not the answer to Appellant's problem because he was having difficulty renting the vacant apartments at the then-existing stabilized rents. Instead, Appellant reduced costs by discharging the elevator operators and substituting a closed-circuit television security system in the elevators and at the service entrance, monitored twenty-four hours by the doorman. The elevators had always been automated. Under the terms of the leases in effect on or before May 31, 1968, Appellant was permitted to discontinue manually operated elevators without any change in the tenants' rent. Appellant gave the tenants notice of the substitution as required by the leases and informed them that manned elevator service would be available in the service ele-

vator from 8 a.m. to 5 p.m. upon request.

The Administrative Proceedings

Appellee directed Appellant to show cause before a hearing officer why Appellant should not be expelled from the Association* for removing elevator operators in violation of Appellee's 1971 Order (A-50) directing Appellant to maintain two elevator operators and a relief man as he had on May 31, 1968.**

The 1971 order resulted from tenant complaints that Appellant's removal of one shift of elevator operators violated §§2(m) and 62 of the Code (A-104) which provide that an owner shall not evade the stabilization rents or other Code requirements by,

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* Expulsion means the building is transferred to rent control, a more restrictive form of control.

** The significance of this date is explained below.

among other things, modifying the services furnished or required to be furnished with the dwelling units on May 31, 1968.

By affirmation of Appellant's attorney, Appellant opposed the proceeding on the grounds, among others, that Appellant would not be afforded a due process hearing before a hearing officer under Appellee's procedures, and that the Statute deprived Appellant of his property rights without a constitutional foundation.*

The two-day hearing lasted nearly seven hours. Only three tenants appeared and testified. At the outset of the hearing,

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* Issues as to bias of the hearing officer, the former enforcement officer who had previously informed Appellant that his action would violate the 1971 order, and as to the inapplicability of the 1971 order, were also raised below.

Appellant's attorney requested that a transcript be prepared and available to Appellee and to Appellant, emphasizing that Appellee, not the hearing officer, was to make the decision. Appellant's attorney also indicated that "the report", i.e., the hearing officer's report, "must be made available to any litigant."

A tape recording of the hearing was made, but no transcript.* No hearing officer's report was prepared as required by the Appellee's Rule 7. (A-118)

On January 12, 1978, two years and three months after the conclusion of the hearing, Appellee met at its once-weekly meeting to consider Appellant's case along

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* Appellant had a transcript prepared for himself after Appellee's decision was rendered.

with many others on its crowded calendar. Appellee did not give Appellant notice of the meeting. The hearing officer presented Appellee with a draft opinion in the form of a Compliance Order. Appellant had not been furnished with a copy of the draft opinion. Appellee voted to adopt the opinion as its order. Appellee did not hear the tape recording of the hearing and did not have the hearing officer's report required by its own Rules.

Appellee's Order (A-32) (a) directed Appellant to restore the elevator service required by the prior order, (b) fined Appellant $3,500 and (c) directed that Appellant's building be referred for inclusion under rent control if Appellant failed to comply within ten days after service of the order.

The Proceedings in the Courts Below

In January, 1978, Appellant sought judicial review of the Appellee's order in the New York State Supreme Court, New York County. In his petition, Appellant raised all of the substantive, due process and constitutional arguments that he had made at the administrative proceedings. He further argued that the hearing officer did not prepare a report as required by Appellee's own rules, and that Appellee did not weigh the evidence or become adequately informed of the proceeding because it never listened to the tape recording of the hearing.

Appellee's answer to Appellant's petition alleged, in part, that Appellant had not been prejudiced by a determination without a hearing officer's report because Appellee had the full record (i.e., the

tape recording and Appellant's attorney's affirmation) before it.

The Court dismissed the petition finding that Appellee's determination had a rational basis and was neither capricious nor arbitrary. (A-13) The Court did not discuss the due process and constitutional issues.

Appellant appealed to the Appellate Division, First Department, once again raising, by briefs and at oral argument, all the due process and constitutional issues he had raised below. On February 1, 1979, that Court unanimously affirmed the lower Court's judgment without opinion.

Appellant moved for reargument which was denied on March 13, 1979.

Appellant then moved in the Court of Appeals for leave to appeal from the Appellate Division's order. In his attorney's affidavit and in the accompanying

brief in support of the motion, Appellant once again argued that he had been denied a due process hearing and that the Statute is unconstitutional. Appellant's motion was denied without opinion by judgment entered May 10, 1979.

Subsequent Proceedings Not in the Record

Appellant did not immediately restore the elevator operators pursuant to Appellee's order, but applied to Appellee for a stay pending this appeal. On July 12, 1979, Appellee rejected Appellant's stay application and issued an Expulsion Order (A-18) terminating Appellant's membership in the Association and referring the building for inclusion under rent control at reduced rents unless Appellant complied with the earlier order within seven days. Appellant paid the $3,500 fine and restored the elevator operators.

The Questions Are Substantial

Introduction

The Rent Stabilization Law constitutes a taking without compensation to landlords who are prevented from collecting fair market rentals because of the law's rent restrictions. This raises a profound issue of deprivation of property without due process.

The so-called "emergency" that was declared in the aftermath of World War II to justify the imposition of rent control ceased long ago. When rent stabilization was enacted in 1969, there was no true emergency. Instead, the City Council merely declared an "emergency" without substantiating its finding:

> "The City Council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the City of New York which emergency was created by war, the effects of war, and the aftermath of hostility; ...." (Section YY51-1.0; A-57).

There is a substantial question as to whether a rent control law which is based upon a declaration of "emergency" without factual basis, is constitutionally valid.

The Enabling Act sets a 5% or less vacancy standard for an emergency but does not define "vacancy rate," nor designate a body to determine the rate. This raises the fundamental questions of whether the "vacancy rate" is unconstitutionally vague and whether a legislature has unbridled discretion to repeatedly determine that an "emergency" continues to exist.

A substantial question also exists as to the manner in which rent stabilization has been applied to the Appellant, who has been forbidden to discontinue a service which he was permitted to discontinue without any change in the rent according to the leases in effect both before and after rent

stabilization.

Even if rent stabilization is constitutional, it is of the utmost importance that it be administered in a constitutional manner. If an administrative tribunal can compel a building owner to add unnecessary building services, which the owner was not required to furnish, without hearing the evidence, without a transcript of the hearing, without a hearing officer's report and without revealing how it otherwise became informed of the matter, the process is tyrannical. The owner becomes the hostage of the tenants, or even just one tenant.

Appellee has violated several of the fundamental principles of due process which an administrative agency must follow,* as well as other due process

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* See Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1938); United States v. Morgan, 307 U.S 183 (1939); United States v. Morgan, 313 U.S. 409 (1941).

rights to which Appellant is entitled. The Appellate Division in Appellant's case has effectively sanctioned a "runaway" agency, one which totally abdicates responsibility to hear and determine to a hearing officer who is not accountable for his actions. The deprivation of due process here and the importance of preserving due process in administrative proceedings, raise substantial issues which warrant this Court's entertaining jurisdiction of this appeal.

The Rent Stabilization Law is Unconstitutional on Its Face: a Declaration of Emergency May Never Justify the Taking of Property Without Compensation; Moreover, There is No Rational Basis for a Finding That a Housing Emergency Has Persisted Since World War II

Although this Court has considered the constitutionality of rent control statutes and has been asked to consider the constitutionality of New York City's Rent

Stabilization Law, 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 313 N.Y.S.2d 733, 261 N.E.2d 647, appeal dismissed, 400 U.S. 962 (1970), Appellant knows of no case in which this Court has been asked to consider whether a rent control statute may work an unconstitutional taking of property, or whether the vacancy rate standard of a housing "emergency" is illusory.

A. The City Council's Declaration of Emergency Does Not Justify the Taking of Property Without Compensation.

The Rent Stabilization Law constitutes a pro tanto taking of property without compensation. Building owners, like Appellant, are prevented by rent regulation from receiving a fair and adequate return on their buildings. Hence, they do not receive any compensation -- no less just compensation -- for their losses. Instead, their losses increase, since their income falls far behind the ever-rising costs of

maintaining buildings in an inflationary economy.

As this Court stated during a time of serious national strife, basic constitutional rights may never be suspended even in times of emergencies. Ex Parte Milligan, 4 Wall.2 (1866):

> "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 4 Wall.121

B. There is No Public Emergency; the Fact That the Law Was Promulgated Under the Guise of the Police Power Does Not Insulate the Law from Judicial Review

Rent controls were instituted in New York City in 1943 to combat what was perceived to be a serious housing "shortage"

resulting from World War II.* There is no basis in fact to support the City Council's declaration that the housing emergency "created" by World War II continued to exist both in 1969, the effective date of the statute, and in 1974, the effective date of the Savings Provision of the finding of emergency, or that the emergency "created" by World War II persists today -- over 30 years later. The finding is a sham and does not justify the imposition of controls and deprivation of property suffered by owners of rent stabilized buildings. See, e.g., Patterson v Daquet, 62 Misc. 2d 106, 308

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* In New York City, as in the rest of the United States, there was indeed no residential building from early 1942 until after August, 1945. But no New York housing was destroyed by war. What was perceived as a "shortage" of housing is better understood as a "shortage of apartments at pre-war rents." This is equivalent to declaring that there is a "shortage" of 5-cent newspapers, 20-cent hamburgers or 10-cent peanut butter, today. Moreover, rent controls do nothing to improve any (footnote continued)

N.Y.S.2d 173, 176 (Civil Ct., Kings Co. 1969), holding the Rent Stabilization Law unconstitutional.

Moreover, the lack of any controls on buildings built from 1947 to 1968 proves that the "emergency" ceased to exist. No new "emergency" arose in 1969. Legislation based upon a declaration of emergency must be invalidated where the emergency ceases to exist. Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) (Holmes, J.):

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed." 264 U.S. at 547-48 (Citations omitted)."

Accord, Milnot Co. v. Richardson, 350 F.

(cont). "shortage"; they do not add apartments. Rent controls just allocate apartments on a non-market basis.

Supp. 221, 223-24 (S.D. Ill. 1972).

The declaration of emergency and the enactment of the Statute were arbitrary and capricious exercises of the police power and thus are subject to judicial scrutiny. Kress, Dunlap & Lane, Ltd. v. Downing, 286 F.2d 212 (3d Cir. 1960):

> "That a legislative body cannot for all times insulate its determinations from judicial inquiry into the continued existence of the legislative facts upon which the constitutionality of the legislation is dependent is well settled." 280 F.2d at 215 (citations omitted).*

This Court should review the Rent Stabilization Law's "finding" of "emergency"

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* See also Milnot Co. v. Richardson, supra, 350 F. Supp. at 224. ("[T]he court is not at liberty to shut its eyes to a possible constitutional infirmity out of deference to [the legislature], when the validity of the law depends upon the truth of what is declared.")

which Appellant submits has no basis in fact.

C. The Vacancy Standard of "Emergency" Is Illusory; It Is Constitutionally Invalid

The Enabling Act sets a standard for an "emergency" of a 5% vacancy rate. This standard is illusory and self-perpetuating. Judicial review is imperative.

Vacancies in a rental housing market are a function of price. As long as rent controls keep rents below market, the vacancy rate will tend to be artificially depressed. For example, rent controlled tenants stay put for years, since their rents are well below market rate.*

*Tenants who retain apartments at artificially low levels deprive others of the opportunity to bid upon these apartments. There is, however, no rational basis to accord these renters such benefits. Moreover, the failure of these renters to compete in the market, as well as the fact that their apartments are made (footnote continued)

Thus, the vacancy rate standard inherently regenerates rent control. There is no end in sight. The perpetuation of rent control in the absence of "an emergency" is a usurpation of power under the guise of legislative wisdom. It works an unconstitutional deprivation of landlords' and tenants' rights and should be invalidated by this Court.

Moreover, both the Statute and the Enabling Act are unconstitutionally vague since they fail to specify any criteria for determining vacancy rates, or any procedure or body to make the determination.

A "vacancy rate" is a function of time. Yet, neither statute sets forth

(cont). unavailable to others, effectively -- and perpetually -- impedes "the transition from regulation to a normal market of free bargaining between landlord and tenant". (A-57)

the time period for which the rate is to be computed. How long must an apartment be vacant - one day; ten days; six months? The statutes do not answer the question.

Furthermore, although the Enabling Act provides that a housing emergency may be declared "as to any class of housing", the Statute does not define "class", or distinguish among the different classes of housing, which experience different vacancy rates. As to some classes, there is no public interest served by rent control and no "emergency" under the 5% vacancy rate standard.

There is no "shortage" of apartments in luxury buildings such as Appellant's, where rents range from upwards of $200 per room, per month. For example, as of September 30, 1975, there were eight vacant apartments in Appellant's building, a vacancy rate of 11.8% -- over six points above the statutory limit -- and, another apartment was to be vacated on October 1, 1975. As to this class of building, the Statute's broad sweep works an unconstitutional taking.

The Statute As Applied To Appellant Unconstitutionally Impairs Appellant's Contract Rights

Appellee's Order directing Appellant to restore an optional service is an unconstitutional application of the Statute and Code. All of the leases in effect on May 31, 1968, and every lease entered into thereafter, permitted Appellant to replace manned-elevator service with automatic-control type elevator service without any change in the rent. The Code (A-108, 117) and the Statute (A-71) require an owner to maintain only those services which he furnished or was required to furnish on May 31, 1968. This is to assure tenants that the stabilized rent established at the May 31, 1968 rate could not be indirectly evaded by a dimunition of services. Since under the terms of the lease, the nature of elevator service could not have affected the tenants' May 31, 1968

rent, and the tenants' right to manned or automatic elevator service was optional with the landlord, Appellant's substitution of a closed-circuit television system for manned elevators was not an evasion of those statutory provisions. Appellee's construction of the Statute and Code as requiring the maintenance of an optional service is surely an unconstitutional impairment of Appellant's contract rights. See Patterson v Daquet, supra., 62 Misc. 2d at 114, 308 N.Y.S.2d at 181.

There Is a Strong Public Policy and Constitutional Mandate Requiring Administrative Agencies to Abide by Their Own Rules

The fundamental principle that ours is a government of laws, not men, requires in every instance that an administrative agency follow its own procedures. Hammond v Lenfest, 398 F.2d 705, 715 (2d Cir. 1968). The failure of a quasi-judicial body to follow its own established

procedure is a violation of due process. United States ex rel. Accardi v Shaugnhessy, 347 U.S. 260 (1954), Service v Dulles, 354 U.S. 363 (1957), Vitarelli v Seaton, 359 U.S. 535 (1959).

Due process requires that agency regulations be followed even if they are more generous than the Constitution requires. Service v Dulles, supra; United States v Heffner, 420 F. 2d 809 (4th Cir. 1969). The doctrine of preventing arbitrariness in administrative proceedings is so strong that reversal of the agency's action is required even if it is likely that a new hearing will produce the same result. United States ex rel. Accardi v Shaughnessy, supra.; Yellin v United States, 374 U.S. 109 (1963); United States v Heffner, supra.

In the instant case, Appellee failed to follow its Rule 7 requiring the

hearing officer to prepare and submit to it, together with the record and such briefs as may be filed, a report setting forth, among other things, the substance of the application or complaint, the issues presented, the findings of fact based upon the entire record and a recommendation to Appellee for action by it. Appellee is then to prepare its own opinion setting forth its determination and the grounds and reasons therefor.

The hearing officer's report was particularly important in Appellant's case. The hearing lasted two days. The tape recording of the hearing was close to seven hours long. There was no transcript. Appellee has nine members, four representing "the public", four representing the

real estate industry and an impartial chairman.* They meet only once a week, hearing a large volume of cases each session. It is unfortunate (but not attributable to Appellant) that Appellee has no time to listen to tape recordings of lengthy hearings. Without compliance with its Rule 7, Appellee could not make a determination upon the evidence as due process requires. Appellant was therefore denied a hearing by the balanced tribunal contemplated by the Statute.

An Administrative Tribunal
Should Not Be a "Rubber Stamp"

Morgan v. United States, 298 U.S. 468 (1936), requires an administrative tribunal making a determination to consider and appraise the evidence no matter how onerous that might be. If that is not done,

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* §YY51-6.0(3) of the Administrative Code of the City of New York. (A-70)

a due process hearing has not been given. It is no answer to say that the evidence supports the findings and the findings support the order. The tribunal cannot abdicate its decision-making function to its staff or the hearing officer.

In this case, the Court need not (and, in any case, should not) probe mental processes. United States v Morgan, 313 U.S. 409 (1941). There was no transcript of the proceeding, no hearing officer's report, and no time taken for Appellee to hear the tape. Appellee could not have appraised the evidence. Nor can Appellee pretend that it gave Appellant a due process hearing simply because a record was made even if that record was a tape recording. A tribunal making a decision must address the evidence and conscientiously reach conclusions that are justified by the evidence. United States v. Morgan, supra., 298 U.S. at 481; see Weekes

v. O'Connell, 304 N.Y. 259, 107 N.E.2d 290 (1952); Kelly v. Monaghan, 9 A.D.2d 92, 191 N.Y.S.2d 632 (1st Dept. 1959). All Appellee did was "rubber stamp" the hearing officer's opinion as its official Order. This was surely a denial of due process.

A Hearing Officer's Report or Opinion Must Be Furnished to a Party Before an Administrative Decision is Rendered

The hearing officer's draft opinion in this case was "exclusive" of the record and should have been furnished to Appellant, as a requirement of a due process hearing.

This Court has uniformly applied the principle that an administrative tribunal must take nothing into account that has not been introduced in some manner into the hearing record. Ohio Bell Telephone v. Public Utilities Commission, 301 U.S. 292, 300 (1937); United States v. Abilene and Southern Railway Co., 265 U.S. 274, 288 (1924). This includes a hearing officer's report or, as in this case, a draft opinion.

Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545(1954).

If the decision maker may stray at will from the record, the right to present evidence and to argue its significance at a formal hearing becomes meaningless. See Morgan v. United States, 304 U.S.1 (1937); Gonzales v. United States, 364 U.S.59 (1960). A party has the right to have the decision based exclusively upon the matters in the record which are known to him and can be controverted. He has the right not only to refute, but also to supplement, explain, and give different perspective to the hearing officer's view of the case. Schwartz, Administrative Law (1976); §135, p. 396-7.*

*The Federal Administrative Procedure Act codifies this principle by granting a party a reasonable opportunity to submit proposed findings and conclusions, exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions, and supporting reasons for the exceptions or proposed findings and conclusions. 5 U.S.C.A. §557(c).

In Mazza v. Cavicchia, supra, the New Jersey Supreme Court held that the failure to disclose the hearer's report violated the "exclusiveness" principle, even if the preparation of a hearing officer's report is not constitutionally required. See United States v. Morgan, supra, 298 U.S. at 478.

The New York Court of Appeals has considered this issue, limiting Mazza to the facts before it, i.e., that the hearing officer's report was statutorily required and that the party had requested it. Sorrentino v. State Liquor Authority, 10 N.Y.2d 143, 218 N.Y.S.2d 635 (1961).

This Court has not had the occasion to determine whether the "exclusiveness" principle extends to a hearing officer's report. The issue is a significant one in administrative procedure and should be finally determined by this Court.

Appellee's Inordinate Delay in Deciding Denied Appellant Due Process

Appellee's extraordinary delay of over two years and three months between the hearing and the decision raises a substantial question as to the denial of due process. Perez v. Lavine, 378 F. Supp. 1390 (S.D.N.Y. 1974); Nelson v. Sugarman, 361 F. Supp. 1132 (S.D.N.Y. 1972).

Delay dims the memory of the hearer and the decider. It places the litigants in limbo and lulls them into a false sense of the status quo. It is particularly pernicious where the ultimate order has retroactive effect.

Here, Appellee's Expulsion Order, (A.18), explicitly encourages tenants to apply for rent reductions because of the prior lack of manned elevator services. Had Appellee ruled promptly, there would have been no cause for suggesting rent.

reductions. Now, tenants will undoubtedly apply for, and Appellee will grant, rent reductions based upon the two-year period when there were no elevator operators. This is surely a denial of due process.

Appellee is notorious for its delays. It is time that it be directed to adhere to a schedule which assures due process. See White v. Mathews, 559 F.2d 852 (2d Cir. 1977), aff'g, 434 F. Supp. 954 (D. Conn. 1976), cert. denied sub nom Califano v. White, 435 U.S. 908 (1978).

Conclusion

It is submitted that each of New York's Courts which has reviewed Appellee's actions and Appellant's challenges to the Rent Stabilization Law, has failed to recognize the constitutional infirmity

of the statute (on its face and as applied) and the serious and far-reaching consequences of Appellee's failure to afford Appellant, and probably many others who have come before it, a due process hearing. We believe that the questions regarding price controls and administrative procedure presented by this appeal are substantial and of public importance.

Respectfully submitted,

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August 8, 1979

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Appellant,

—against—

JEROME PRINCE, FRANK A. BARRERA, IRVING H. STOLZ, PAUL A. VICTOR, MARC A. GOODMAN, JACOB B. WARD, MARTY MARKOWITZ & ROBERT C. WEAVER, being the members of the CONCILIATION AND APPEALS BOARD, and the HOUSING AND DEVELOPMENT ADMINISTRATION,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

APPENDIX

MYRON BELDOCK
JON B. LEVISON
BELDOCK LEVINE & HOFFMAN
565 Fifth Avenue
New York, New York 10017

Attorneys for Appellant

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ITEM A

Judgment of the
New York Court of Appeals
dated May 10, 1979

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of May A.D. 1979

PRESENT, HON. LAWRENCE H. COOKE,
Chief Judge, presiding

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1 Mo. No. 412
Isaac Kaplan d.b.a. Insjarl Realty Co., Appellant,
For an Order &c.
vs.
Jerome Prince &ors., being the Members of the conciliation and Appeals Board, &ano.,
Respondents.

A motion for leave to appeal and

for a stay to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is

denied with twenty dollars costs and necessary reproduction disbursements.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

ITEM B

Order of the Appellate Division, First Department dated March 15, 1979

(Denying reargument and leave to appeal to the Court of Appeals)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on March 13, 1979

Present--Hon. Harold Birns, Justice Presiding
Herbert B. Evans
Arnold L. Fein
Joseph P. Sullivan
J. Robert Lynch, Justices

Isaac Kaplan d/b/a Insjarl Realty Co., for an Order Pursuant to Article 78 of the CPLR,

Petitioner-Appellant,

-against-

M-724

Jerome Prince, Frank A. Barrera, Irving H. Stolz, Paul A. Victor, Marc A. Goodman, Jacob B. Ward, Marty Markowitz and Robert C. Weaver, being the members of the Conciliation and Appeals Board, and the Housing and Development Administration,

Respondents-Respondents.

The above named petitioner-appellant having moved for reargument of, or for

leave to appeal to the Court of Appeals from, the order of this Court entered on February 1, 1979.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

Joseph J. Lucchi
Clerk.

NOTICE OF ENTRY
SERVED BY MAIL MARCH 15, 1979

ITEM C

Order of the Appellate Division, First Department dated February 2, 1979

(Affirming judgment of Supreme Court, New York County)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 1, 1979.

Present--Hon. Harold Birns, Justice Presiding
Herbert B. Evans
Arnold L. Fein
Joseph P. Sullivan
J. Robert Lynch, Justices.

Isaac Kaplan d/b/a Insjarl Realty Co. for an order pursuant to Article 78 of the Civil Practice Law and Rules,

Petitioner-Appellant,

-against-

4495

Jerome Prince, Frank A. Barrera, Irving H. Stolz, Paul A. Victor, Marc A. Goodman, Jacob B. Ward, Marty Markowitz & Robert C. Weaver, being the members of the Conciliation and Appeals Board and the Housing and Development Administration,

Respondents-Respondents.

An appeal having been taken to this Court by the petitioner-appellant from the judgment of the Supreme Court, New York

County (Shainswit, J.), entered on July 14, 1978, denying petitioner's application and dismissing the petition, and said appeal having been argued by Mr. Joseph H. Muraskin of counsel for the appellant, and by Mr. Cullen S. McVoy of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, and that the respondents shall recover of the appellant $75 costs and disbursements of this appeal.

ENTER:

Joseph J. Lucchi
Clerk.

NOTICE OF ENTRY
SERVED BY MAIL
FEB. 2, 1979

ITEM D

Judgment of the Supreme Court, New York County, July 14, 1978

At a Special Term, Part I of the Supreme Court of the State of New York held in and for the County of New York, at the Courthouse, 60 Centre Street, Borough of Manhattan, City of New York on the 20th day of June, 1978

P R E S E N T :

HON. BEATRICE SHAINSWIT

Justice.

ISAAC KAPLAN, d/b/a INSJARL REALTY CO., for an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Petitioner,

-against-

JEROME PRINCE, FRANK A. BARRERA, IRVING H. STOLZ, PAUL A. VICTOR, MARC A. GOODMAN, JACOB B. WARD, MARTY MARKOWITZ, & ROBERT C. WEAVER, being the members of the CONCILIATION AND APPEALS BOARD, and the HOUSING AND DEVELOPMENT ADMINISTRATION,

Respondents.

JUDGMENT

Index No.

A proceeding having come on to be heard before me on April 13, 1978 for judicial review pursuant to Article 78 of the Civil Practice Law and Rules;

NOW, upon reading and filing the Order to Show Cause herein signed by Hon. Max Bloom dated January 26, 1978, and the Petition verified January 25, 1978, and the exhibits annexed thereto, all submitted in support of the Petition, the Answer to said Petition, verified April 11, 1978, and the affidavit of Ellis S. Franke sworn to April 11, 1978, all submitted in opposition thereto, the Notice of Cross-Motion to Dismiss Petition by respondent Department of Housing Preservation and Development (successor to Housing and Development Administration) dated April 11, 1978, the Affirmation of Charles Olstein dated

April 11, 1978, and the Exhibit annexed thereto, and the affirmation of Charles Olstein dated April 14, 1978, in support of the cross-motion, the Affirmation of Joseph H. Muraskin, dated April 12, 1978, and the Court having read and considered the Return filed by the New York City Conciliation and Appeals Board, the papers and documents upon which the order of the New York City Conciliation and Appeals Board here under review was made, and upon all the papers and proceedings heretofore had herein, and after hearing Joseph H. Muraskin (David Mandel, of counsel), Attorney for the Petitioner, in support of said Petition, Ellis S. Franke, General Counsel to the New York City Conciliation and Appeals Board, Attorney for the CAB Respondents (Cullen S. McVoy, Assistant Counsel, of Counsel), in

opposition thereto, and Allen G. Schwartz, Corporation Counsel, Attorney for Department of Housing Preservation and Development (Charles Olstein, of Counsel) in support of the Cross-Motion to Dismiss the Petition, and due deliberation having been had thereon, and the Court having rendered its written memorandum opinion,

NOW, upon motion of ALLEN G. SCHWARTZ, Corporation Counsel, it is

ORDERED that the cross-motion be and the same is hereby granted in all respects; and it is further

ORDERED that petitioner's application for judgment be and the same is hereby denied in all respects; and it is further

ORDERED and ADJUDGED that the petition be and the same is hereby dismissed with prejudice; and it is further

ORDERED and ADJUDGED that respondents recover of petitioner dollars costs of this proceeding.

E N T E R :

s/Beatrice Shainswi
J.S.C.

F I L E D

Jul 14 1978

New York
Co. Clerk's
Office

s/Norman Goodman
Clerk

ITEM E

**Decision of the Supreme Court,
New York County, dated
May 16, 1978**

DECISION

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

----------x

ISAAC KAPLAN d/b/a INSJARL REALTY CO.,

Petitioner,

for an Order pursuant to Article 78 of The Civil Practice Law and Rules

-against-

JEROME PRINCE, FRANK A. BARRERRA, IRVING H. STOLZ, PAUL A VICTOR, MARC A. GOODMAN, JACOB B. WARD, MARTY MARKOWITZ, & ROBERT C. WEAVER, being the members of the CONCILIATION AND APPEALS BOARD, and the HOUSING AND DEVELOPMENT ADMINISTRATION,

Respondents.

----------x

SHAINSWIT, J.:

This is an Article 78 proceeding, seeking to set aside a determination of the Conciliation and Appeals Board as

being arbitrary and capricious.

Respondent Housing and Development Administration cross-moves to dismiss the petition as against it. That motion is granted both on jurisdictional grounds for late service, and because the petition fails to state a cause of action against HDA and indeed demands no relief as against HDA.

As to the remaining respondents, the petition is likewise dismissed. There is no basis to the challenge. Petitioner here unilaterally removed the operators from its elevators and installed a television security system. Respondent, after a full hearing, found this action by the landlord to be a violation of its rules. Because respondent determined that the violation was a wilful one, petitioner was fined $3,500. This action was

solidly based on the record since, in the past, petitioner had reduced the attended elevation service and the Board had ordered him to restore it. On complaint by petitioner, that decision was reviewed by this Court (Spector, J., NYLJ June 1, 1972) and the petition was dismissed, leaving the Board's order intact. Services were restored and remained in effect until the landlord made the present change, this time on the theory that the television security system would make up for the loss in protective services. The Board did not agree and found that protective services were reduced.

The questions as to what are "required services" under the Rent Stabilization Code, and what constitutes a diminution of those services, are factual de-

terminations which are properly made by respondent (Sherwood Assoc. v. C.A.B., NYLJ Sept. 22, 1971, p. 2, col. 3). The determination by respondent that petitioner must continue its prevailing practice of having the elevators attended is authorized by Section 62 of the Rent Stabilization Code.

That code also provides for the imposition of sanctions. Under the circumstances a fine of $3,500 is not arbitrary. Petitioner did unilaterally violate the prior order of the Board, which had been, in effect, affirmed by the Court.

This Court finds that the respondent's determination has a rational basis and, accordingly, was neither capricious nor arbitrary. This application is denied and the petition is dis-

missed.

Settle judgment.

Dated: May 16, 1978

s/ B.S.
J.S.C.

ITEM F

Expulsion Order of the
Conciliation and Appeals
Board dated July 12, 1979

EXPULSION ORDER NUMBER 327

DOCKET NUMBER	4074
OPINION NUMBER:	1545
COMPLIANCE ORDER NUMBER:	1545-C-25
TENANT: ADDRESS:	Mildred Schwartz 750 Park Avenue New York, N.Y.10021
SUBJECT BUILDING:	Same - Apt. 10-B
OWNER:	Insjarl Realty Co. c/o Joseph Muraskin, Esq. 1350 Avenue of the Americas New York, N.Y. 10019 and Myron Beldock, Esq Beldock, Levine and Hoffman 565 5th Avenue New York, N.Y. 10017

FACTS:

The owner is a member of the Rent Stabilization Association and the dwelling unit involved is subject to the Rent Stabilization Law.

The tenant filed a complaint of diminution of services alleging that the owner has decreased manned 24 hours a day elevator and doorman service by converting the 7:30 a.m. to 4 p.m. daytime elevator shift to self-service.

The Board issued its Order and Opinion Number 1545 (copy attached) on October 19, 1971, directing the owner to restore elevator and protective services to the required level by having the elevator manned by an operator during the 7:30 a.m. to 4 p.m. shift as well as during the remaining two shifts.

The owner sought judicial review of the Board's Order and Opinion 1545. The court dismissed the owner's petition. The court stated "...this curtailment of manually-operated services ipso facto, is a "modification" of those services

provided by petitioner on May 31, 1978". (Matter of Insjarl Realty Co. v. Conciliation and Appeals Board, N.Y.L.J., June 1, 1972, p. 17, col. 4 (Sup. Ct., N.Y. Co., Spector, J.) No appeal was filed as to that court order.

No further complaint was received from the tenants as to manned elevator service until subsequent to their being served with a letter from the managing agent of the building dated June 10, 1975. Said letter advised the tenants that "...on and after June 21, 1975, the north passenger elevator will be operated automatically under tenant control, in lieu of its present manual operation." The tenants contended that a termination of manned elevator service would violate the

Board's Order in Opinion Number 1545.

Subsequently, the owner advised that he did not intend to violate the previously issued Board Order (Opinion 1545). It contended that installation of a closed circuit TV security system would be a "substitution" for the manned elevator operators; that the elevator operators were being removed; and if there were any tenant complaints, the owner would respond thereto and request a hearing.

On August 27 and 28, 1975 an Order to Show Cause was served upon the parties. In addition copies of said order were served upon other tenants who had filed new complaints regarding the discontinuance of manned elevator service in the subject building. A hearing was conducted by the staff of this Board on

the Order to Show Cause.

Thereafter on January 12, 1978 the Board issued Compliance Order Number 1545-C-25 (copy attached) directing the owner to restore the required service of manned, 24 hour a day, elevator and doorman services at the subject premises as it was directed in Opinion Number 1545. In addition thereto, the Board levied a fine of $3,500.00 against the owner. The order further advised the owner that if it failed to comply with the two Board's Orders issued herein, the Board would notify the Housing and Development Administration (now known as the Department of Housing Preservation and Development) that the owner had forfeited its membership in the Rent Stabilization Association; and that the building would be referred to the Office

of Rent Control for appropriate action to subject the premises to control under the provisions of City Rent Control (Title Y, Chapter 51 of the Administrative Code of the City of New York).

Subsequently, the owner sought judicial review of the Board's Compliance Order. The owner obtained a series of court ordered stays of enforcement of the Board's Order. A bond was posted by the owner to assure the payment of the fine of $3,500.00 levied by the Board.

The court dismissed the owner's petition to set aside the Board's Order, Matter of Issac Kaplan, d/b/a Insjarl Realty Co. v. Conciliation and Appeals Board, N.Y.L.J. May 19, 1978 p. 7, Col. 1 (Sup. Ct. N.Y. Co., Shainswit, J.). (Copy attached). The Appellate Division,

First Department unanimously affirmed, without opinion, the lower court's decision by order entered February 1, 1979. Thereafter, in an order dated March 13, 1979, the Appellate Division denied a motion for leave to appeal to the Court of Appeals and for re-argument. On May 10, 1979, the Court of Appeals denied the appellant's motion for leave to appeal. A copy of the order denying the motion for leave to appeal was served upon the owner on May 16, 1979.

Subsequently, in attempting to obtain compliance with the Board's Orders issued herein, members of the staff of the Board were advised that attorneys, newly engaged by the owner intended to institute proceedings in the Federal courts on a constitutional question; and, that they would attempt to seek a stay of the

Board's orders in said courts. The attorneys requested that the matter be held in abeyance in order for them to confer with the owner, until July 2, 1979. Said request was granted.

The owners attorneys by letters dated July 5 and July 11, 1979 and attachments thereto submitted certain material to the Board by way of a request for a "stay" of enforcement of the Board's order contending that a further appeal will be taken to the Federal courts on a constitutional question as well as other questions of law and fact.

The owner proposed that in consideration of a grant of a "stay" of the Board's Order herein, it would be pe prepared to pay the fine previously levied by the Board ($3,500.00), under protest, on condition that said fine be

recovered if the owner prevails in the appeal.

In addition, the owner offers to forego rent increases while the appeal is pending (as a self imposed penalty) until the appeal is determined; and, if the owner is not successful on appeal, it would seek to collect the rent increases prospectively only. If it is successful on appeal, it would seek to collect the increases retroactively.

As an alternate proposal, the owner offers to restore one elevator operator despite its feeling that there is no need for the elevator operators.

APPLICABLE LAWS AND REGULATIONS:

Section YY51-6.0 of the Rent Stabilization Law
Sections 2(m) 7,8 and 62 of the Code.

DETERMINATION:

After due deliberation and based upon the entire record, the Board unanimously holds that the owner's request for a "stay" of enforcement of the Board's Order previously issued herein is denied.

Section 7(b) of the Rent Stabilization Code provides that a member of the Rent Stabilization Association shall forfeit his status as a member in good standing and shall have his membership terminated pursuant to an Order of the Conciliation and Appeals Board in the event that the Conciliation and Appeals Board determines that as to one or more dwelling units in the building the owner has failed to abide by an Order of the Conciliation and Appeals Board within ten (10) days of the date of issuance

of such Order. As the facts herein demonstrate, this owner has failed to abide by two (2) Orders of the Board issued respectively on October 19, 1971 (Opinion Number 1545) and January 12, 1978 (Compliance Order Number 1545-C-25) to restore service to the required level by restoring manned elevator service 24 hours a day as directed in Opinion Number 1545 and Compliance Order Number 1545-C-25.

Accordingly, this Board unanimously holds that this owner has forefeited its status as a member in good standing of the Rent Stabilization Association and its membership in such association is hereby terminated as to all the rent stabilized apartments at 750 Park Avenue, New York, N.Y. and; that

the rentals of all rent stabilized tenants in the subject building be immediately reduced to the rental in effect prior to the current guideline increases unless, within seven (7) days of the date of service of a copy of this order upon it, the owner: a) restores required elevator operators for two shifts of manned elevator service (the 12 midnight to 7:30 or 8:00 a.m. shift to be covered by the doorman); and, b) the owner pays the fine of $3,500.00 previously levied against it by this Board. The aforesaid fine payable to the Rent Stabilization Association is to be forwarded to the offices of the Conciliation and Appeals Board.

If, at the end of the aforementioned seven (7) day period, the owner

has not fully complied with this Order, this matter will be referred to the Department of Housing Preservation and Development for appropriate proceedings to subject it to control under the provision of the City Rent Control Law (Title Y, Chapter 51, New York City Administrative Code).

Section 62E of the Code provides that this Board may reduce the rent of the tenants if it finds that services have not been provided.

In the event that the owner complies fully with this Order; and, remains a member of the Rent Stabilization Association, this Order's provisions are without prejudice to the tenant's right to exercise their remedy, if appropriate, under Section 62E of the Code.

CONCILIATION AND APPEALS BOARD

July 12, 1979

Participating:

Emanuel P. Popolizio, Chairman
Marc A. Goodman
H. Dale Hemmerdinger
Marty Markowitz
Allan Stillman
Paul A. Victor
Jacob B. Ward

ITEM G

Compliance Order of the Conciliation and Appeals Board dated January 12, 1978

COMPLIANCE ORDER NUMBER 1545-C-25

DOCKET NUMBER: 004074

TENANT: Various
ADDRESS: 750 Park Avenue,
New York, N.Y.

SUBJECT BUILDING: Same

OWNER: Insjarl Realty Co.
c/o Douglas Elliman
Gibbons & Ives, Inc.
ADDRESS: 575 Madison Avenue
New York, NY 10022

FACTS:

The owner is a member of the Rent Stabilization Association and the dwelling units involved are subject to the Rent Stabilization Law. The building in question contains 68 residential apartments and three professional offices.

This Board issued a previous order in this matter: Order and Opinion No. 1545 on October 19, 1971. In that Board proceeding (Docket No. 004074) the

tenant had filed a complaint alleging that the owner had decreased the required service of manned, 24 hours a day, elevator and doorman service by converting the 7:30 A.M. to 4:00 P.M. daytime elevator shift to self-service. The Board found under Order and Opinion No. 1545 that the facts clearly established that the owner undisputedly was providing manually operated elevator service on a 24 hour basis on May 31, 1968, the base date for required services under the Rent Stabilization Law and Code. Accordingly, the Board, pursuant to Order and Opinion No. 1545, directed the owner to restore elevator and protective services to the required level by having the elevator manned by an elevator operator during the 7:30 A.M. through 4 P.M. shift as well as during the

remaining two shifts. The owner of the building was directed to comply with the terms of Order and Opinion No. 1545 within ten days from the date a copy thereof was served upon it. The owner initiated an Article 78 proceeding challenging the Board's Order and Opinion. The Court dismissed the owner's petition, with the Court stating "However, this curtailment of manually-operated services ipso facto, is a 'modification' of those services provided by petitioner on May 31, 1968". [Matter of Insjarl Realty Co. v. Conciliation and Appeals Board, N.Y.L.J., June 1, 1972, p. 17, col. 4 (Sup. Ct., N.Y. Co., Spector, J.)]. No appeal was filed as to the aforesaid order of the Court.

No further complaint from the

tenants as to manned elevator service was received by this Board until subsequent to service upon them of a letter dated June 10, 1975 from the managing agent of the building. The June 10, 1975 letter to the tenants stated that "***on and after June 21, 1975, the North passenger elevator will be operated automatically under tenant control, in lieu of its present manual operation". The tenants asserted that such a termination of manned elevator service violated Order and Opinion No. 1545 issued by this Board. On June 20, 1975 a letter from the Chief of the Division of Compliance of this Board was served by hand upon the attorney for the owner advising him that any unilateral action, as specified in the owner's June 10, 1975 letter, prior to the filing of an application

by the owner with this Board and the issuance of a Board order determining such application, may be viewed by the Board as a wilful violation of the Rent Stabilization Law and Code, and Opinion No. 1545. In a reply letter dated June 24, 1975, the attorney for the owner stated that he had contacted members of the staff of the Board and had been apprised by them that the owner could apply upon notice to all 68 tenants, to the Board for an advisory opinion prior to installation. The attorney for the owner stated in his reply letter that he understood an alternative to the aforementioned procedure would be to make its proposed substitution of a closed circuit TV security system and remove the elevator operators; and if there were any tenant complaints the

owner would then reply thereto and request a hearing. The letter from the owner's attorney went on to state that after such considerations, the owner decided to install the security system, give notice to the tenants that manned elevator service would be terminated on June 21, 1975, that very few of the tenants complained to the Conciliation and Appeals Board and the plan was effective as outlined. It was contended in the letter that the owner did not intend to violate the previously issued Board order. A hearing of the parties was requested in the letter on behalf of the owner.

On August 27 and 28, 1975 an Order to Show Cause entitled "In the Matter Between the Conciliation and Appeals Board and Insjarl Realty Co." was served on the owner, the attorney for the

owner, and the tenant, Schwartz. Additionally copies of the Order to Show Cause were served upon the following tenants who had recently filed new complaints about termination of manual elevator service: Fenton, Apt. 11A (Docket No. 11864), Apfelbaum, Apt. 10C (Docket No. 11939), Boorman, Apt. 17B (Docket No. 12368). The owner was required thereby to show cause why it "should not forfeit its status as a member in good standing and shall not have its membership in the Rent Stabilization Association with respect to the entire building therein suspended or terminated for its refusal to abide by an order of said Conciliation and Appeals Board". The hearing was attended by Issac Kaplan, the principal of Insjarl Realty Co., owner and tenants

Schwartz, Sampson and Boorman. The owner, in direct oral testimony and cross-examination stated under oath, as well as in a written submission, that the building contains one passenger elevator and that elevator was manned by operators on a 24 hour basis on the May 31, 1968 base date; that the owner, subsequent to a compoaint filed by the tenant Schwartz, was directed by Order and Opinion No. 1545 issued by the Conciliation and Appeals Board on October 19, 1971 to continue to provide the same level of manned passenger elevator service as existed on May 31, 1968; and that the Board's order was upheld by the Supreme Court, New York County (Spector, J.) upon Article 78 challenge by the owner.

The owner testified that several apartments in the building were vacant as of the date of the hearing and that it would be a financial hardship to continue with the base date service of furnishing manned elevator service 24 hours a day on the passenger elevator. The owner also stated that the installation of the closed circuit TV security system and the removal of manned operators from the passenger elevator resulted in a substitution of services as opposed to a diminution of services in derogation of the Rent Stabilization Law and Code. The owner stated on direct examination that the tenants are afforded the same degree or greater protection and security with the new system as was provided by manned operation of elevators.

The tenants, Schwartz, Boorman and Sampson disputed the owner's contentions and testified inter alia, that security had been substantially curtailed, since the doormen who now observe the closed circuit security system often leave their posts thereby providing an opportunity for intruders to board the unmanned elevator. Further, the tenants testified that manned elevator operation was provided on the base date May 31, 1968, and that the change in the level of service constitutes a diminution of services in violation of the Board's Order and Opinion and the decision of the Supreme Court, (Matter of Insjarl Realty Co. v. Conciliation and Appeals Board, cited above).

The hearing officer appointed by this Board questioned the owner

as to his contention that furnishing manned elevator service, as was the base date practice, constitutes a financial burden. The owner acknowledged that he was aware of the comparative hardship provisions of the Rent Stabilization Law and Code, but indicated that he wasn't interested in pursuing that course.

The tenant, Boorman who resides at the subject premises made a motion returnable September 19, 1975, shortly after the Board completed its hearings, seeking a preliminary injunction against the owner of the building and what the Court later described as a proceeding analogous to a "request for Summary Judgment." The tenant alleged therein substantially the same issues as were before this Board in its proceeding. The

Court in Boorman v. Insjarl Realty Co., et al., referred to in N.Y.L.J., December 15, 1975, p. 10, col. 4 (Sup. Ct. N.Y. Co., Helman, J.) (mem. op. dated December 10, 1975, Index No. 16213/75) denied the Tenant's motion and held that the Plaintiff-Tenant has an adequate remedy under the Rent Stabilization Law, which she is presently pursuing and that the Tenant should exhaust her administrative remedies.

APPLICABLE LAW AND REGULATIONS:
Section YY51-6.0 of the Rent Stabilization Law
Section 2(m), 7,8 and 62 of the Code

DETERMINATION:

Section 7(b) of the Rent Stabilization Code provides that a member of the Rent Stabilization Association shall forfeit his status as a member in good standing and shall have his membership terminated by an order of the Conciliation and Appeals Board, where the Board determines that, as to one or more dwelling units in the premises, the owner has refused to abide by an order of the Conciliation and Appeals Board within ten days of the date of issuance of such order.

Based on the record before the Board in the instant matter, the Board finds that the owner has violated both its obligations pursuant to the Rent Stabilization Law and Code and Order and Opinion No. 1545 of this Board which was sustained by the Supreme Court in Matter of Insjarl Realty Co. v. Conciliation and Appeals Board, N.Y.L.J., June 1, 1972, p. 17, col. 4 (Sup. Ct., N.Y. Co., Spector, J.).

The Board notes that the terms and conditions of this order are consistent with the owner's obligations under the Rent Stabilization Law and Code to

maintain all services at the level provided on May 31, 1968 and are based on the Board's and Court's previous rulings regarding this owner's obligation to provide manned, 24 hour a day, elevator and doorman service at the premises 750 Park Avenue, New York, N.Y. The costs of maintaining services and equipment in a building, other than major capital improvements to the building, are reflected in the periodic rent guidelines increases the owner receives under Rent Stabilization. These increases, which a tenant of a rent stabilized apartment must pay each time he renews his tenancy, are designed by the New York City Rent Guidelines Board, inter alia, to compensate owners for the maintenance of services to insure that the owner may meet its obligations under the

Rent Stabilization Law to maintain the building and its facilities at the level provided on May 31, 1968. Mechanical devices do not assure the tenant the same level of services as provided on the base date. Matter of Sommer v. Prince, 55 A.D. 2d 535 389 N.Y.S. 2d 791 (1st Dept., 1976) Motion for leave to appeal denied by Court of Appeals, N.Y.L.J. May 17, 1977, p. 6, col. 2.

The Board therefore directs the owner of the premises, within ten (10) days of the date service of this order is made upon the parties, to restore the required service of manned, 24 hours a day, elevator and doorman services at the premises 750 Park Avenue, New York, New York as required by Order and Opinion No. 1545 of this Board. Further, Section 8 of the Rent Stabilization Code provides that any

action of any member constituting a violation of the Rent Stabilization Law and Code shall result in such discipline, fine or sanction as may be determined by the Conciliation and Appeals Board.

The record herein warrants immediate disciplinary action under Section 8 as follows: a fine in the amount of $3,500.00 payable within ten (10) days after service of this order. The aforesaid fine payable to the Rent Stabilization Association is to be forwarded to the offices of the Conciliation and Appeals Board within such ten day period.

In the event the owner fails to comply with the conditions of this order and the directives contained in the Board's prior order, within the specific time periods prescribed herein, the Board will immediately notify the

Housing and Development Administration that the owner has forfeited its membership in the Rent Stabilization Association effective as of the date service of this order is made on the owner and shall refer all of the dwelling units in the premises 750 Park Avenue, New York, NY to the Offices of Rent Control in the Department of Rent and Housing Maintenance for appropriate administrative action to subject the premises to control under the provisions of the City Rent Control Law (Title Y, Chapter 51 of the Administrative Code of the City of New York).

CONCILIATION AND APPEALS BOARD
January 12, 1978

Participating:

Dean Jerome Prince, Chairman
Frank A. Barrera
Irving H. Stolz
Paul A. Victor
Marc A. Goodman
Jacob B. Ward

Marty Markowitz

Concurring:

Robert C. Weaver

ITEM H

Opinion of the Conciliation and Appeals Board dated October 14, 1971

OPINION NUMBER 1545

DOCKET NUMBER: 004074

TENANT: Hyman Schwartz
ADDRESS: 750 Park Avenue, New York, N.Y. 10021

SUBJECT BLDG: Same - Apt. 10B

OWNER: Imperial Realty Co.,
Attn: Mr. Ralph R. Russ

ADDRESS: 358 Fifth Avenue, New York, N.Y.

FACTS:

The owner is a member of the Rent Stabilization Association and the dwelling unit involved is subject to the Rent Stabilization Law of 1969.

The present tenant took occupancy of the subject apartment pursuant to a lease which commenced March 1, 1969 and expired February 28, 1971. When this lease expired, the parties executed a renewal lease for a one year term beginning March 1, 1971 and terminating March 1,

1972. The amount of rent is not in issue.

The tenant filed a complaint of a decree in required services, stating that the owner had maintained manned elevator and doorman service 24 hours a day until April 30, 1971 but that on April 30, 1971, the owner converted the 7:30 a.m. to 4 p.m. daytime elevator shift to a self-service shift and that such action constituted a decrease in required services. The tenant states, on information and belief, that the elevator was manually operated round the clock on May 31, 1968.

In its answer, the owner conceded that the elevator was fully manned 24 hours a day on May 31, 1968 but alleges that the passenger elevator has always been an automatic elevator and although manually operated, the manual opera-

tion of this automatic elevator was eliminated during the hours of 8 a.m. to 4 p.m. because there was very little traffic on the elevator during those hours. The owner contends that it is not a reduction in required services to convert a manually operated elevator to automatic operation so long as 24 hour doorman service is provided.

The tenant, in reply, reasserts that the shift eliminated was from 7:30 a.m. to 4 p.m., not 8 a.m. to 4 p.m. as alleged by the owner, and alleges that the security in the elevator was decreased when the owner removed the elevator operator from that shift. The tenant claims he rented an apartment in this building partly because of the feeling of security he derived from

a manually operated elevator service 24 hours a day.

APPLICABLE LAW AND REGULATIONS:

Sections 2(m) and 62 of the Code.

DETERMINATION:

Section 62 of the Code prohibits an owner from evading the stabilized rent or other requirements of the Code by modification of required services. Section 2(m) of the Code defines "required services" as "(t)hat space or those services which were furnished or were required to be furnished for the dwelling unit on May 31, 1968" including elevator service and protective services. The purpose of the Rent Stabilization Law and Code is to protect tenants from exorbitant increases in rent and modification of the services provided in consideration

for that rent. Protective services are specifically mentioned in Section 2(m) as a "required service". The facts in this case are undisputed that the owner maintained manually operated elevator service on a 24 hour basis on May 31, 1968. The owner is therefore directed to restore elevator and protective services to said level by having the elevator manned by an elevator operator during the 7:30 or 8 a.m. through 4 p.m. shift as well as during the remaining two shifts.

The owner is directed to comply with the terms of this order within ten (10) days from the date a copy hereof is served upon it.

CONCILIATION AND APPEALS BOARD

October 14, 1971

Participating:

Judah Gribetz, Chairman
Frank C. Arricale
Frank A. Barrera
Dean Jerome Prince
Irving H. Stolz
Jacob B. Ward
William J. Williams

Concurring:

Mrs. Barbara Reach

ITEM I

Relevant Sections of the New York City Rent Stabilization Law and related enactments

NEW YORK CITY RENT STABILIZATION LAW

Sections YY51-1.0 to YY51-7.0, set forth below, comprise the rent stabilization law in effect on March 31, 1974, in the City of New York. These provisions were enacted by Local Law No. 16 of 1969 and are designated as YY51-1.0 to YY51-7.0 of the Administrative Code of the City of New York.

Sec.

Section YY51 - 1.0 Findings and declaration of emergency

The Council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the City of New York which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings; that unless residential rents and eviction continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the Council con-

tinues to be imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; and that the policy herein expressed is now administered locally within the city of New York by an agency of the city itself, pursuant to the authority conferred by chapter twenty-one of the laws of nineteen hundred sixty-two.

The Council further finds that many owners of housing accommodations in mul-

tiple dwellings not subject to the provisions of the city rent and rehabilitation law, enacted pursuant to said enabling authority, either because they have been constructed since nineteen hundred forty-seven or because they were decontrolled due to monthly rental of two hundred fifty dollars or more or for other reasons are demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency which has led to a continuing restriction of available housing, as evidenced by the 1968 vacancy survey by the United States Bureau of the Census; that such increases are being exacted under stress of prevailing conditions of inflation and of an acute housing shortage resulting from a sharp decline in private residential construction brought about by a combination of local and national factors; that such increases

and demands are causing severe hardship to tenants of such accommodations and are uprooting long-time city residents from their communities; that unless such accommodations are subject to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and that such conditions constitute a grave emergency.

* * *

Section YY51 - 1.0 Findings and declaration of emergency

Savings Provision. L.1974, c.576, § 15, eff. May 29, 1974 until July 1, 1981, as amended L.1976, c.486, § 2; L.1977, c. 203, § 1, provided that: "Construction. All rights, remedies and obligations heretofore created pursuant to the New York city rent stabilization law, including those contained in the code of the rent stabilization association of New York city, approved by the New York city housing and development administration, and the orders of the conciliation and appeals board, shall inure to the benefit of all owners and tenants of units subject to this chapter [L.1974, c. 576]. Nothing herein contained shall in any way diminish the powers of the conciliation and appeals board, the rent guidelines board of the New York city housing and development administra-

tion to make, amend or modify rules, regulations, or guidelines pursuant to this chapter or any local law."

* * *

Section YY51 - 3.0 Application

This law shall apply to

a. Class A multiple dwellings not owned as a cooperative or as a condominium, containing six or more dwelling units which:

(1) were completed after February first, nineteen hundred forty-seven, except dwelling units (a) owned or leased by, or financed by loans from, a public agency or public benefit corporation, (b) subject to rent regulation under the private housing finance law or any other state law, (c) aided by government insurance under any provision of the National Housing Act, to the extent this local law or any regulation or order issued thereunder is inconsistent therewith, or (d) located in a building for which a certificate of occupancy is obtained after March tenth, nineteen hundred sixty-nine; or (e) any class A multiple dwelling which on June first, nineteen hundred sixty-eight was and still is commonly regarded as a hotel, transient hotel or residential hotel, and which customarily provides hotel service such as maid service, fur-

nishing and laundering of linen, telephone and bell boy service, secretarial or desk service and use and upkeep of furniture and fixtures; or (2) were decontrolled by the city rent agency pursuant to section Y51-12.0 of the city rent and rehabilitation law; or (3) are exempt from control by virtue of items (1), (2), (6) or (7) of subparagraph (i) of paragraph 2 of subdivision e of section Y51-3.0 of such law; and

b. other housing accommodations made subject to this law pursuant to the emergency tenant protection act of nineteen seventy-four. As amended L.1974, c.576, §7.

Section YY51 - 3.1 Application to multiple family complex

For purposes of this title a class A multiple dwelling shall be deemed to in-

clude multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities such as sewer line, water main, and heating plant, and operated as a unit under a single ownership on May sixth, nineteen hundred sixty-nine, notwithstanding that certificates of occupancy were issued for portions thereof as one- or two- family dwellings.

* * *

Section YY51 - 4.0 Stabilization of rents

a. Dwelling units covered by this law as provided in section YY51-3.0 or section YY51-3.1 shall be deemed to be housing accommodation subject to control under the provisions of title Y of chapter fifty-one of the administrative code notwithstanding any provision of such title to the contrary, unless the owner of such units is a member in good standing of any association registered with the housing

and development administration pursuant to section YY51-6.0 or section YY51-6.1. For the purposes of this law a "member in good standing" of such an association shall mean an owner of a housing accommodation subject to this law who joined such an association within thirty days of its registration with the housing and development administration or within thirty days after becoming such owner or within sixty days after such housing accommodation becomes subject to regulation pursuant to the emergency tenant protection act of nineteen seventy-four, whichever is later, provided such accommodations were not under actual control of the city rent agency when he became the owner thereof, and further provided such owner complies with prescribed levels of fair rent increases established under this law or with guidelines for rent adjustments authorized pursuant to the

emergency tenant protection act of nineteen seventy-four and this law, does not violate any order of the conciliation and appeals board and is not found by the conciliation and appeals board to have harassed a tenant to obtain vacancy of his housing accommodation.

b. In the event that such dwelling units shall be subject to control under the provisions of such title as provided in subdivision a, the city rent agency shall establish the maximum rent therefor on the basis of the rent charged on May thirty-first, nineteen hundred sixty-eight.

c. The housing and development administration shall have power to promulgate such rules and regulations as it may deem necessary for the effective implementation of this law.

* * *

Section YY51 - 6.0 Real estate industry stabilization association

a. A real estate industry stabilization association having as members the owners of no less than forty percent of the dwelling units covered by section YY51-3.0 of this law may register with the housing and development administration under the terms and for the purpose herein provided by filing with such administration copies of its articles of incorporation or association, copies of its rules, and such other information as the administration may require within sixty days of the effective date of this law.

b. An association shall not be accepted for registration hereunder unless it appears to the housing and development administration that (1) consistent with the

provisions of section YY51-4.0 membership is open to any owner of a multiple dwelling having dwelling units covered by this law as provided in section YY51-3.0; (2) the association has adopted a code for stabilization of rents covering related terms and conditions of occupancy which is approved by such administration; (3) the association has established a conciliation and appeals board consisting of four members representing the public, four members representing the real estate industry and an impartial chairman, all to be appointed by the mayor with the approval of the council, to serve until April first, nineteen hundred seventy-four, to receive and act upon complaints from tenants and upon appeals from owners claiming hardship under the levels for fair rent increases adopted under this

law; (4) each member is required to agree in writing to comply with the code and to abide by orders of the conciliation and appeals board; and (5) the association is of such character that it will be able to carry out the purposes of this law.

c. A code shall not be approved hereunder unless it appears to the housing and development administration that such code (1) is designed to provide safeguards against unreasonably high rent increases and, in general, to protect tenants and the public interest, and not to impose any industry wide schedule of rents or minimum rentals; (2) binds the members of the association not to exceed the level of fair rent increases under any lease renewal or new tenancy bearing an effective date on or after June first, nineteen hundred sixty-eight for dwelling units

covered by this law or, on or after the local effective date of the emergency tenant protection act of nineteen seventy-four to comply with the provisions of section YY51-6.0.1, provided that nothing herein shall supersede or modify the rent increase permitted by the city rent agency following decontrol pursuant to section Y51-12.0 of the city rent and rehabilitation law and the regulations adopted thereunder; (3) provide for a cash refund or a credit to be applied against future rent in the amount of the excess, if any, of rent paid since January first, nineteen hundred sixty-nine over the permitted level of fair rent increases; (4) includes provisions, subject to section YY51-4.1(1) f. requiring members to grant a two or three-year lease at the option of the tenant; requiring members to grant a one

year renewal lease upon the request of a tenant at such fair rent levels provided for by the rent guidelines board except where a mortgage or mortgage commitment existing as of April first, nineteen hundred sixty-nine, provides that the mortgagor shall not grant a one year lease; and further requiring members to allow any tenant sixty-two years of age or older who has a lease commencing on or after July first, nineteen hundred seventy-four to extend the term to a full two or three year term upon request of such tenant on or before September thirtieth, nineteen hundred seventy-five. Members shall certify on forms prescribed by the conciliation and appeals board, to all tenants in occupancy of dwelling units subject to this title, the amount of the legal regulated rent and any guidelines

increase in such rent for lease renewal pursuant to and as authorized by the New York city rent guidelines board, or certify the legal regulated rent and the lawful increase in such rent ordered by the conciliation and appeals board based on owner hardship. Members shall serve such notice as the conciliation and appeals board shall require on tenants under renewal lease terms which commence on or after July first, nineteen hundred seventy-four and prior to September thirtieth, nineteen hundred seventy-five; (5) includes guidelines with respect to such additional rent and related matters as, for example, security deposits, advance rental payments, the use of escalator clauses in leases and provision for increase in rentals for garages and other ancillary facilities, so as to insure that the level of fair rent increase established

under this law will not be subverted and made ineffective; (6) provides criteria whereby the conciliation and appeals board may act upon applications by owners for increases in excess of the level of fair rent increase established under this law provided, however, that such criteria shall provide (a) as to hardship applications, for a finding that the level of fair rent increase is not sufficient to enable the owner to maintain approximately the same average annual net income (which shall be computed without regard to debt service, financing costs or management fees) for the three year period ending on or within six months of the date of an application pursuant to such criteria as compared with annual net income, which prevailed on the average over the period nineteen hundred sixty-eight through nineteen hundred seventy, or for the first three years of opera-

tion if the building was completed since nineteen hundred sixty-eight or for the first three fiscal years after a transfer of title to a new owner provided the new owner can establish to the satisfaction of the conciliation and appeals board that he acquired title to the building as a result of a bonafide sale of the entire building and that the new owner is unable to obtain requisite records for the fiscal years nineteen hundred sixty-eight through nineteen hundred seventy despite diligent efforts to obtain same from predecessors in title and further provided that the new owner can provide financial data covering a minimum of six years under his continuous and uninterrupted operation of the building to meet the three year to three year comparative test periods herein provided; and (b) as to completed building-

wide major capital improvements, for a finding that such improvements are deemed depreciable under the Internal Revenue Code and that the cost is to be amortized over a five-year period, based upon cash purchase price exclusive of interest or service charges. Notwithstanding anything to the contrary contained herein, no increase granted pursuant to this paragraph shall, when added to the annual gross rents, as determined by the conciliation and appeals board, exceed the sum of, (i) the annual operating expenses, (ii) an allowance for management services as determined by the conciliation and appeals board, (iii) actual annual mortgage debt service (interest and amortization) on its indebtedness to a lending institution, an insurance company, a retirement fund or welfare fund which is operated under the supervi-

sion of the banking or insurance laws of the state of New York or the United States, and (iv) eight and one-half percent of that portion of the fair market value of the property which exceeds the unpaid principal amount of the mortgage indebtedness referred to in subparagraph (iii) of this paragraph. Fair market value for the purposes of this paragraph shall be six times the annual gross rent. The collection of any increase in the stabilized rent for any apartment pursuant to this paragraph shall not exceed six percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectivity of any dollar excess above said sum to be spread forward in similar increments and added to the stabilized rent as established or set in future years; (7) estab-

lishes a fair and consistent formula for allocation of rental adjustment to be made upon granting of an increase by the conciliation and appeals board; (8) requires the members of the association to maintain all services furnished by them on May thirty-first, nineteen hundred sixty-eight, in connection with the leasing of the dwelling units covered by this law; (9) provides that an owner shall not refuse to renew a lease except where he intends in good faith to demolish the building and has obtained a permit therefor from the department of buildings or where he has submitted to and the attorney general has accepted for filing an offering plan to convert the building to cooperative or condominium ownership, and the owner has presented the offering plan to the tenants in occupancy and has filed a copy thereof

with the housing and development administration, and the plan provides: (a) the plan will not be declared effective unless and until thirty-five per cent of the tenants then in occupancy have agreed to purchase dwelling units or the stock entitling them to proprietary leases for such dwelling units with no discriminatory repurchase agreement or other discriminatory inducement; (b) the tenants in occupancy at the time of the offering shall have the exclusive right to purchase their dwelling units or the shares allocated thereto for ninety days after the offering, during which time a tenant's dwelling unit shall not be shown to a third party unless he has, in writing waived his right to purchase; (c) subsequent to the expiration of the ninety days exclusive right to purchase set forth in (b) above, a tenant in

occupancy of a dwelling unit who has not purchased shall be given the exclusive right for an additional period of six months from said expiration date to purchase said dwelling unit or shares allocated thereto on the same terms and conditions as are contained in an executed contract to purchase said unit or shares entered into by a bona fide purchaser, such exclusive right to be exercisable within fifteen days from the date of mailing by registered mail of notice of the execution of a contract of sale together with a copy of said executed contract; (d) for a period of at least one year after the offering and until such time as the plans declared effective, whichever is later, he shall be entitled to remain in possession without any increase in his rent, although his lease may have expired,

and thereafter, if he has not purchased, he may be removed by the owner or a purchaser of the dwelling unit or proprietary lessee entitled to possession of such dwelling unit; (e) if the tenant's lease expires after the period during which he otherwise has the right to remain in possession as hereinabove provided, he shall not be required to vacate his dwelling unit until the expiration of his lease, unless such lease is terminated in accordance with such code; and (f) if the plan has not been declared effective within eighteen months from the date of the presentation of such plan to the tenants, it will be declared abandoned, and if the plan is abandoned or is not declared effective within such eighteen month period, the tenants then in possession shall have the right to demand leases in accordance

with this law; provided that this section shall apply only to tenants in occupancy at the time of the presentation of the plan and shall not be applicable to tenants who are not in occupancy or to subtenants, that any dwelling unit which shall become vacant prior to the transfer of the property to the cooperative corporation or the condominium owner, or a declaration of abandonment of the offering plan, shall not be rented except at a rental which would have been authorized had the vacating tenant remained in possession, and provided further that notwithstanding anything contained herein to the contrary, any renewal or vacancy lease executed after notice to the housing and development administration that a proposed cooperative or condominium plan has been submitted to the attorney general may con-

tain a provision that the lease may be cancelled after ninety days' notice to the tenant that the plan has been declared effective, and under any lease containing such a provision, upon submission of the plan of cooperative or condominium ownership to the tenant after acceptance by the attorney general no increase in rent may be collected thereafter pursuant to said lease; and on specified grounds set forth in the code approved by the housing and development administration consistent with the purpose of this law; (10) specifically provides that if a member fails to comply with any level of fair rent increase established under this law or any order of the conciliation and appeals board or is found by the conciliation and appeals board to have harassed a tenant to obtain vacancy of his housing accommodation, he shall not be a member in good

standing of the association; (11) for any violation of the articles, code or other rule or regulation of the association, other than those specified in subparagraph (10) immediately preceding, members shall be appropriately disciplined by such sanction as fine or censure; and (12) provides for the imposition of dues upon the association's members solely for the purpose of defraying the reasonable expenses of administration and authorizing the equitable allocation of dues among the association's members; (13) establishes procedures for senior citizen rent increase exemptions and equivalent tax abatement for rent regulated property in accordance with the provisions of section YY51-4.1.

* * *

Conciliation and Appeals Board; Members; Powers. L.1974, c. 576, § 6, eff. May 29, 1974 until July 1, 1981, as amended L.1976, c. 486, § 2; L.1977, c. 203, § 1, provided that: "a. The New York city conciliation and appeals board established pursuant to the provisions of section YY51-6.0 of the administrative code of the city of New York is hereby continued as a nine member board to be appointed by the mayor with the approval of the city council. Four members shall be representative of tenants, four members shall be representative of owners, and one member shall be designated by the mayor serve as the impartial chairman and shall hold no other public office. Two members representative of tenants and two members representative of owners shall serve for terms ending two years from January first next succeeding

the dates of their appointment; two members representative of tenants and two members representative of owners shall serve for terms ending three years from January first next succeeding the dates of their appointment and the impartial chairman shall serve for a term ending four years from January first next succeeding the date of his appointment. All successor members shall serve for terms of four years each. Members shall continue in office until their successors have been appointed and qualified. The mayor shall fill any vacancy which may occur by reason of death, resignation, or otherwise in a manner consistent with the original appointment. A member may be removed by the mayor for cause, but not without an opportunity to be heard in person or by counsel, in his defense, upon not less than ten days notice.

"b. The powers of the board shall be vested in and exercised by no less than five of the members thereof then in office two of whom shall be representative of tenants; two of whom shall be representative of owners and one of whom shall be the impartial chairman or a member acting on his behalf. The board may delegate to one or more of its members, officers, agents or employees such powers and duties as it may deem proper.

"c. The board shall continue until terminated by law.

"d. The board shall have power to appoint officers, agents, and employees, prescribe their duties and fix their compensation and to do any and all things necessary or convenient to administer the regulation and control of residential rents as provided in the rent stabilization law of

nineteen hundred sixty-nine and the emergency tenant protection act of nineteen seventy-four; notwithstanding any provision of law to the contrary.

"e. The board's powers shall include but shall not be limited to, the powers:

"(1) To sue and be sued;

"(2) To have a seal and alter the same at pleasure;

"(3) To make and execute contracts and all other instruments necessary or convenient for the exercise of its power and functions under this act;

"(4) To make and alter by-laws for its organization and internal management, to make rules and regulations governing the use of its property and facilities;

"(5) To acquire, hold and dispose of personal property;

"(6) To procure insurance against

any loss in connection with its property and other assets in such amounts, and from such insurers, as it deems desirable;

"(7) To accept any gifts or grants or loans of funds or property or financial or other aid in any form from the federal government or any agency or instrumentality thereof or from the state or the city or from any other source and to comply, subject to the provisions of this act, with the terms and conditions thereof;

"(8) To engage the services of private consultants on a contract basis for rendering professional and technical assistance and advice;

"(9) To administer oaths, take evidence, issue subpoenas, conduct investigations and designate officers to hear and report;

"(10) To do any and all things

necessary or convenient to carry out the purposes and exercise its powers.

"f. The New York city conciliation and appeals board shall administer its regulation of residential rents as provided in the rent stabilization law of nineteen hundred sixty-nine and the emergency tenant protection act of nineteen seventy-four."

ITEM J

Relevant Sections of the Emergency Tenant Protection Act of Nineteen Seventy-Four

CHAPTER 5 - EMERGENCY TENANT PROTECTION ACT OF NINETEEN SEVENTY-FOUR [NEW]

Sec.

§ 8621. Short title

This act shall be known and may be cited as the "emergency tenant protection act of nineteen seventy-four".

§ 8622. Legislative finding

The legislature hereby finds and declares that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York which emergency was at its inception created by war, the effects of war and the aftermath of hostilities, that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist in many areas of the state an acute shortage of housing accommodations caused by continued high demand,

attributable in part to new household formations and decreased supply, in large measure attributable to reduced availability of federal subsidies, and increased costs of construction and other inflationary factors; that a substantial number of persons residing in housing not presently subject to the provisions of the emergency housing rent control law or the local emergency housing rent control act are being charged excessive and unwarranted rents and rent increases; that preventive action by the legislature continues to be imperative in order to prevent exaction of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that in order to prevent uncertainty, hardship and

dislocation, the provisions of this act are necessary and designed to protect the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while the ultimate objective of state policy, must take place with due regard for such emergency; and that the policy herein expressed shall be subject to determination of the existence of a public emergency requiring the regulation of residential rents within any city, town or village by the local legislative body of such city, town or village.

§ 8623. Local determination of emergency; end of emergency

a. The existence of public emergency requiring the regulation of residential rents for all or any class or classes of

housing accommodations heretofore destabilized; heretofore or hereafter decontrolled, exempt, not subject to control, or exempted from regulation and control under the provisions of the emergency housing rent control law, the local emergency housing rent control act or the New York city rent stabilization law of nineteen hundred sixty-nine, or subject to stabilization or control under such rent stabilization law, shall be a matter for local determination within each city, town or village. Any such determination shall be made by the local legislative body of such city, town or village on the basis of the supply of housing accommodations within such city, town or village, the condition of such accommodations and the need for regulating and controlling residential rents within such city, town or village. A dec-

laration of emergency may be made as to any class of housing accommodations if the vacancy rate for the housing accommodations in such class within such municipality is not in excess of five percent and a declaration of emergency may be made as to all housing accommodations if the vacancy rate for the housing accommodations within such municipality is not in excess of five percent.

b. The local governing body of a city, town or village having declared an emergency pursuant to subdivision a of this section may at any time, on the basis of the supply of housing accommodations within such city, town or village, the condition of such accommodations and the need for continued regulation and control of residential rents within such municipality, declare that the emergency is either wholly

or partially abated or that the regulation of rents pursuant to this act does not serve to abate such emergency and thereby remove one or more classes of accommodations from regulation under this act. The emergency must be declared at an end once the vacancy rate described in subdivision a of this section exceeds five percent.

c. No resolution declaring the existence or end of an emergency, as authorized by subdivisions a and b of this section, may be adopted except after public hearing held on not less than ten days public notice, as the local legislative body may reasonably provide.

* * *

§ 8625. Housing accommodations subject to regulation

a. A declaration of emergency may be made pursuant to section three as to all or

any class or classes of housing accommodations in a municipality, except:

(1) housing accommodations subject to the emergency housing rent control law, or the local emergency housing rent control act, other than housing accommodations subject to the New York city rent stabilization law of nineteen hundred sixty-nine;

(2) housing accommodations owned or operated by the United States, the state of New York, any political subdivision, agency or instrumentality thereof, any municipality or any public housing authority;

(3) housing accommodations in buildings in which rentals are fixed by or subject to the supervision of the state division of housing and community renewal under other provisons of law or the New York city department of housing preservation and development or the New York state urban de-

velopment corporation, or, to the extent that regulation under this act is inconsistent therewith aided by government insurance under any provision of the National Housing Act;

(4)(a) housing accommodations in a building containing fewer than six dwelling units;

(b) for purposes of this paragraph four, a building shall be deemed to contain six or more dwelling units if it is part of a multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities such as a sewer line, water main or heating plant and operated as a unit under common ownership, notwithstanding that certificates of occupancy were issued for portions thereof as one- or two-family dwellings.

(5) housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January first, nineteen hundred seventy-four;

(6) housing accommodations owned or operated by a hospital, convent, monastery, asylum, public institution, or college or school dormitory or any institution operated exclusively for charitable or educational purposes on a non-profit basis;

(7) rooms or other housing accommodations in hotels, other than hotel accommodations in cities having a population of one million or more not occupied on a transient basis and heretofore subject to the emergency housing rent control law, the local emergency housing rent control act or to the New York city rent stabilization law

of nineteen hundred sixty-nine;

(8) any motor court, or any part thereof, any trailer, or trailer space used exclusively for transient occupancy or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof;

The term "motor court" shall mean an establishment renting rooms, cottages or cabins, supplying parking or storage facilities for motor vehicles in connection with such renting and other services and facilities customarily supplied by such establishments, and commonly known as motor, auto or tourist court in the community.

The term "tourist home" shall mean a rooming house which caters primarily to transient guests and is known as a tourist home in the community.

(9) non-housekeeping, furnished housing accommodations, located within a single dwelling unit not used as a rooming or boarding house, but only if:

(a) no more than two tenants for whom rent is paid (husband and wife being considered one tenant for this purpose), not members of the landlord's immediate family, live in such dwelling unit, and

(b) the remaining portion of such dwelling unit is occupied by the landlord or his immediate family.

(10) housing accommodations in buildings operated exclusively for charitable purposes on a non-profit basis;

(11) housing accommodations which are not occupied by the tenant in possession as his primary residence.

ITEM K

Relevant Sections of the Amended Code of the Rent Stabilization Association of N.Y.C., Inc.

Amended Code Of The Rent Stabilization Association of N.Y.C., Inc.

Introduction

On May 12, 1969 the New York City Council enacted the Rent Stabilization Law. This law provided for a rent stabilization system for approximately 400,000 dwelling units most of which had been built between 1947 and 1969, and the balance being dwelling units which had been decontrolled pursuant to specified provisions of the City Rent Law.

In 1971, the State Legislature provided for the decontrol of all voluntarily vacated rent controlled or rent stabilized apartments.

On March 20, 1974 the Mayor signed into Law, Local Law 1 of 1974 extending the provisions of the Rent Stabilization Law for an additional five-year term, thereby continuing without interruption the rights and obligations of tenants and owners of

approximately 270,000 stabilized dwelling units. On May 29, 1974 and June 13, 1974, respectively, the State of New York enacted Chapters 576 and 941 of the Laws of 1974 Authorizing The City of New York to expand the jurisdiction of the Rent Stabilization Law until July 1, 1976 to all dwelling units which: (a) had previously been subject to the Rent Stabilization Law or the City Rent Law but which had been vacancy destabilized or vacancy decontrolled after July 1, 1971; and (b) which are still subject to the City Rent Law but become vacant in the future; and (c) which were built between March 10, 1969 and December 31, 1973; and (d) which were or are decontrolled because of owner occupancy; and (e) which were entitled to tax exemption benefits under Section 423 of the Real Property Tax Law.

By adoption of Resolution No. 276 on June 20, 1974, the New York City Council

placed these additional dwelling units, an estimated 450,000 in number, under the Rent Stabilization Law effective July 1, 1974.

To distinguish between those units which had been and continued subject to the Rent Stabilization Law prior to the local effective date of Chapter 576 and/or 941 from those dwelling units which have or will become subject to the Rent Stabilization Law solely by virtue of Chapters 576 and 941, this Code refers to the former class of units as dwelling units subject to the Rent Stabilization Law on June 30, 1974, and to the latter classes of units as dwelling units subject to the Rent Stabilization Law on or after July 1, 1974.

Section 1. Statutory Authority

This Code of the Rent Stabilization Association of New York City, Inc,, is adopted subject to approval of the Housing and Development Administration

pursuant to the powers granted to and in accordance with the Rent Stabilization Law of 1969 (Local Law 16 of 1969) as extended by Local Law 1 of 1974 of The City of New York and as amended by and in accordance with the provisions of Chapter 576, Laws of 1974 of the State of New York (hereinafter referred to by the short title "Chapter 576"), Chapter 941, Laws of 1974 of the State of New York (hereinafter referred to by the short title "Chapter 576"), Chapter 941, Laws of 1974 of the State of New York (hereinafter referred to by the short title "Chapter 941"), and the resolution of the City Council of The City of New York No. 276 adopted June 20, 1974 and effective July 1, 1974. As used in this Code the term "RSL" shall mean the Rent Stabilization Law; the term "CAB" shall mean the New York City Conciliation and Appeals Board, and the term "RSA" shall

mean the Rent Stabilization Association of N.Y.C., Inc.

* * *

Section 2. Definitions

(m) "Required Services": - (1) That space and those services which were furnished or were required to be furnished for the dwelling unit on May 31, 1968, and all additional services provided or required to be provided thereafter or with respect to a building subject to the RSL pursuant to Section 421 of the Real Property Tax Law, the date of issuance of the permanent Certificate of Occupancy and all additional services provided or required to be provided thereafter. These shall to the extent so furnished or required to be furnished, include repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, telephone, elevator service removal of refuse

and janitorial services and ancillary services including but not limited to garage space and service, protective services and recreational facilities; provided that (a) for dwelling units subject to the RSL on June 30, 1974 or subject to the provisions of Section 421 or Section 423 of the Real Property Tax Law, in the case of any required or ancillary services for which a separate charge was made on May 31, 1968 (i) where there is a common ownership directly or indirectly between the operator of any such services and the owner, any such charge shall be within the limitations of the RSL: (ii) where no such common ownership existed either on May 31, 1968 or on the effective date of the RSL and such services were provided on such effective date by an independent contractor pursuant to a contract with the owner such charges shall

be excluded from the provisions of this Code, (b) For dwelling units subject to the RSL on June 30, 1971 and exempted thereafter as a result of vacancy prior to July 1, 1974, any required or ancillary services for which a separate charge was made on May 31, 1968 (i) where there is a common ownership directly or indirectly between the operator of any such services and the owner, any such charges shall be within the limitations of the RSL: (ii) where no such common ownership existed either on May 31, 1968 or on the effective date of the RSL and such services were provided on such effective date by an independent contractor pursuant to a contract with the owner such charges shall be excluded from the provisions of this Code; (c) for all other dwelling units which become subject to the RSL on or after July 1, 1974 any required or ancillary ser-

vices for which a separate charge was made on May 29, 1974 (i) where there is a common ownership directly or indirectly between the operator of any such service and the owner, any such charge shall be within the limitations of the RSL: (ii) where no such common ownership existed on May 29, 1974 and such services were provided on such effective date by an independent contractor pursuant to a contract with the owner such charges shall be excluded from the provisions of this Code. A copy of any such contract shall be filed with the Industry Association no later than 30 days from the date of approval of this Code. Owners shall comply with the requirement of the Housing Maintenance Code that each dwelling unit must be painted at least once every three years. In the event of a lease renewal for a term of less than three years,

the tenant may be required to bear a pro rata part of the actual painting cost provided however, that such charge shall be proportionally refundable to the tenant in the event the same tenant further renews.

(2) Required Services resulting from amendments to the RSL and pursuant to the provisions of Chapter 576.

(i) The required building-wide services for dwelling units subject to the RSL on June 30, 1971 and exempted thereafter as the result of vacancy prior to July 1, 1974, shall be those services provided or required to be provided on May 31, 1968; the required individual unit services for such dwelling units shall be those services provided or required to be provided on May 29, 1974.

(ii) The required building-wide and individual unit services for dwelling units

which become subject to the RSL on July 1, 1974 pursuant to Section 423 of the Real Property Tax Law shall be those services provided or required to be provided on May 29, 1974, and all additional services provided or required to be provided thereafter, except that for dwelling units in Riverton which became subject to the RSL on July 1, 1974 pursuant to an initial legal regulated rent date of June 30, 1973, the required building-wide and individual unit services shall be those services provided or required to be provided on June 30, 1973, and all additional services provided or required to be provided thereafter.

(iii) The required building-wide and individual unit services for all other dwelling units not subject to the RSL on June 30, 1974 which become subject to the RSL on or after July 1, 1974, shall be those services

provided or required to be provided on May 29, 1974 and all additional services provided or required to be provided thereafter.

(iv) Notwithstanding any other provision of this Code, nothing shall operate to modify the required services for a dwelling unit subject to the RSL on June 30, 1974, and such building wide and individual unit services shall be those services provided or required to be provided on May 31, 1968 and all additional services provided or required to be provided thereafter.

* * *

Section 7

A member shall forfeit his status as a member in good standing and shall have his membership with respect to the entire building or any dwelling unit therein suspended or terminated pursuant to an order of the CAB, in the event said Board deter-

mines that with respect to one or more dwelling units in the building he has either:

(a) willfully exceeded the level of fair rent increase established by the RSL, the Guidelines Board, or this Code. All charges in excess of the level of fair rent increases shall be deemed willful unless the member proves otherwise, or

(b) has refused to abide by an order of said CAB within ten days of the date of issuance of such order, or

(c) has been found by the CAB to have harassed a tenant to obtain vacancy of his apartment.

* * *

Section 8

Any action of any member constituting a violation of the RSL or this Code other than a violation as described in section 7, shall

result in such discipline, fine or sanction, as may be determined by the Board of Directors of the Industry Association or the CAB.

* * *

Section 34

The CAB shall, in addition to the general powers conferred upon it by the RSL, Chapter 576 and this Code, have the following specific duties:

A. The determination of any complaints of harassment instituted by a tenant;

B. The determination of any claim of violation against any member requiring suspension or other discipline pursuant to Sections 7 and 8 of this Code . . . .

* * *

Section 62

A. The stabilization rents and other requirements provided in this Code shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of dwelling units by requiring the tenant to pay or obligate himself for membership or other fees, or by modification of the practices relating to payment of commissions or other charges, or by modification of the services furnished or required to be furnished with the dwelling units, or otherwise.

. . .

E. In addition to any other remedy afforded by law, any tenant may apply to the CAB for a reduction in the rent to the level in effect prior to the most recent guidelines adjustment and the CAB may so reduce the rent if it finds that the owner has failed to maintain required services.

ITEM L

Rule 7 of the Rules of the Conciliation and Appeals Board

Rules of the Conciliation and Appeals Board

Rule 7. After the conclusion of a hearing conducted by a hearing officer pursuant to Rule 6, or, if the Board does not require a hearing, after the completion of the hearing officer's study of the documents submitted in support of, and in opposition to, an owner's hardship application, or, in the event that no hearing is held, after the completion of the hearing officer's study of the documents submitted in support of, or in opposition to a complaint, the hearing officer shall prepare and submit to the Board, together with the record and such briefs as may be filed, a report setting forth (a) the name and address of the applicant or complainant, (b) the names and addresses of the persons who appeared in opposition to the application or complaint, (c) the

names of counsel, (d) the date or dates of the hearing if one was held, (e) the substance of the application or complaint, (f) the issues presented, (g) the findings of fact based upon the entire record, and (h) a recommendation to the Board for action by the Board. The Board shall then, after due deliberation, make its determination and shall prepare an opinion setting forth its determination and the grounds and reasons therefor. In the case of a hardship application, two copies of this opinion shall be mailed to the applicant, and it shall be the duty of the applicant, immediately upon receipt of the copies, to post one copy of the opinion in a conspicuous place in the building involved. In the case of a complaint, a copy of the opinion shall be mailed to the tenant and to the owner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-208

ISSAC KAPLAN d/b/a INSJARL REALTY CO., for an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Appellant,

-against-

JEROME PRINCE, FRANK A. BARRERA, IRVING H. STOLZ, PAUL A. VICTOR, MARC A. GOODMAN, JACOB B. WARD, MARTY MARKOWITZ & ROBERT C. WEAVER, being members of the CONCILIATION AND APPEALS BOARD, and the HOUSING AND DEVELOPMENT ADMINISTRATION,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FIRST JUDICIAL DEPARTMENT

MOTION OF APPELLEE CONCILIATION AND APPEALS BOARD TO DISMISS OR AFFIRM

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Cullen S. McVoy,
of Counsel

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The Appellee moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New York, Appellate Division, First Depart-

ment on the ground that no substantial federal question is raised warranting review by the United States Supreme Court.

STATEMENT

The appellant is the owner of a 62 unit luxury apartment building located in New York City. The building is registered with the Rent Stabilization Association, which means that the owner has voluntarily accepted the benefits and obligations of regulation under the Rent Stabilization Law. The benefits include regular periodic rent increases in amounts designed to keep the owner abreast of inflation and to continue to properly maintain his building and provide services to the tenants. The obligations include providing the same level of services which were provided on the statutory base date——May 31, 1968, and obedience of orders issued by the Conciliation and Appeals Board (the appellee, hereinafter referred to as the Board), the quasi-Judicial enforcement arm of the rent stabilization system.

On May 31, 1968, the owner, portraying the building to prospective tenants as a "full service" building, provided 24 hour manned elevator service. Thus, when the

owner brought his building into the rent stabilization system in 1969, the law required him to continue to maintain his building at the May 31, 1968 level; and thus continue providing 24 hour manned elevator service. The guidelines increases, including factors for payroll, assured him continued base date level profits (and if not fully adequate in his case supplemented by a hardship increase upon applying therefor —an act never taken by the owner.)

The owner first attempted to curtail manned elevator service in 1970. However, the tenants complained to the Board that such curtailment had resulted in a reduction in building security. The Board ruled that 24 hour manned elevator service was a required service under the Rent Stabilization Law and Code as to the building in question and directed the owner to restore the service in full. The Board's order was subsequently affirmed by the Supreme Court of the State of New York, held in and for New

York County.

Thereafter, in 1975 the owner completely eliminated manned elevator service in direct violation of the Board's previous order and in disregard of prior written notice by the Board, warning him of the illegality of such actions. The owner asserted that there was no longer a need for the elevator operators because he had installed a closed circuit television monitor which served the same security function as the dismissed elevator operators.

The Board held a full oral hearing of the parties, at which the owner appeared with counsel, presented witnesses on his behalf, and cross-examined all adverse witnesses. On the basis of the undisputed evidence of record, the Board found that 24 hour manned elevator service was a required service under the Rent Stabilization Law and Code; that the television monitor did not compensate for the security lost due to the dismissal of the elevator opera-

tors; and that the owner had willfully violated the Board's prior order. The Board's order directed the owner to restore 24 hour manned elevator service and, within the authority granted to it by the Rent Stabilization Law and Code, the Board ordered the owner to pay a fine of $3,500.00.

The owner challenged the Board's order in the New York State Supreme Court, New York County. That Court affirmed the Board's order in all respects. The owner then appealed to the Appellate Division, First Department. That Court unanimously affirmed the judgment of the lower court, and subsequently denied the owner's motion to reargue before the Appellate Division or, alternatively, for leave to appeal to the New York Court of Appeals. The owner next made a motion to the New York Court of Appeals for leave to appeal. That motion was denied.

The appellant now seeks to invoke the appellate jurisdiction of this Court by raising a series of sweeping and unfounded

arguments against the constitutionality of the Rent Stabilization Law of 1969, as amended, as well as rent regulatory laws in general. Although the Supreme Court has repeatedly and consistently upheld rent regulatory statutes against myriad constitutional challenges, appellant now seeks to rehash the same issues laid to rest in earlier case law. His approach is a shotgun constitutional attack. Significantly he submits not a single supporting appellate court decision or a scintilla of evidence to show this is other than a frivolous claim.

For example, appellant asserts there has never been a housing emergency in the City of New York warranting the passage of the Rent Stabilization Law. His papers are devoid of a single citation or shred of evidence to discredit the battery of objective data upon which the City and State of New York rely in determining that a serious housing emergency continues to exist.

The appellant also contends that he

was denied his due process right to be heard; yet the record clearly shows that the appellant was afforded ample opportunity to be heard through a full oral hearing as well as written submissions, and the evidence adduced generated no material issue of fact to be resolved by the Board.

Clearly, the appellant's constitutional arguments are wholly lacking in any basis in law or fact. Thus, the appellant's contentions, which have been heard and unanimously rejected by the New York Courts, do not present a substantial federal question warranting review by the Supreme Court.

THE PRECURSORS OF THE RENT STABILIZATION LAW

The Rent Stabilization law of 1969 as amended by the Emergency Tenant Protection Act of 1974 is the most recent in a series of laws passed by the City and State of New York in an effort to curb unjust and unreasonable rents in urban areas afflicted by an acute and enduring housing shortage. Laws of this nature first appeared in New York in the early 1920's with the enactment of the Emergency Housing laws of the State of New York (Chapters 942-953, Laws of 1920). Thereafter, Congress instituted rent regulation which became applicable to New York in 1943 through the National Price Control Act (Pub. L.421, 77th Cong.; 56 Stat. 23; 50 U.S.C. Sections 901-946).

In 1950, New York State assumed responsibility for rent regulation from the federal government by enactment of the Emergency Housing Rent Control Law of 1950 (Chapter 250, Laws of 1950). Then in 1962 New York State

delegated the authority to regulate rents within New York City to the City by enacting the Local Emergency Housing Rent Control Act of 1962 (Chapter 20, Laws of 1962) otherwise known as the State Enabling Act; and the New York City Council promptly exercised this authority by passing the City Rent and Rehabilitation Law (Local Law No. 20, Laws of 1962) thus continuing standard rent controls within the City under the City's direct administration. The Rent Control Law, which is enforced by the City's housing agency, has been renewed periodically since 1962 based on triennial surveys of the availability of rental housing, and remains in effect to the present day because of the continued existence in New York City of a vacancy rate far below the 5% level statutorily determined to trigger decontrol.

THE RENT STABILIZATION LAW

The Rent Stabilization Law of 1969 (Local Law 16, Chapter 51, Title YY Administrative Code of the City of New York) was

enacted by the New York City Council pursuant to the same State Enabling Act which authorized the passage of the Rent Control Law and is also predicated upon the surveys of vacancy rates in New York City.

The purpose of the Rent Stabilization Law was to extend rent regulation to a category of dwellings which the Rent Control Law had left to the vagaries of the free market, i.e., multiple dwellings completed after World War II. The abundancy of post-war housing until the late sixties precluded the need for its regulation. However, forces in the market place created both a severe shortage of supply and the inflationary spiralling of rent, preconditioning the need for regulation. The local legislative body chose a form of rent regulation substantially different (and perhaps more modern in its approach) from standard rent controls. The City Rent Law continued to regulate the City's 1,200,000 pre-war housing; the Rent Stabilization Law regulated 375,000 post World War II and a

small number of pre-war luxury decontrolled apartments.

The two co-existing systems retained their respective jurisdictions until 1971, when the State of New York enacted the Vacancy Decontrol Law (Chapter 391, Laws of 1971). This law provided for the automatic deregulation of both rent controlled and rent stabilized apartments upon vacancy. The framers of the law thought this bill would encourage new construction and rehabilitation of existing housing. That purpose was not realized. Instead, a Temporary State Commission on Living Costs found unbridled inflationary forces had been set loose, which, aggravated by the housing shortage, had worsened the conditions in New York City and its environs where the rental housing market is heavily concentrated. In 1974 the New York State Legislature acted to deal with this renewed emergency by substantially repealing the Vacancy Decontrol Law and adopting the Emergency Tenant Protection Act of 1974 (ETPA)

(Chap. 576, Laws of 1974) extending the rent stabilization system to all vacancy decontrolled apartments.

The Emergency Tenant Protection Act thus amended the Rent Stabilization Law to return to its jurisdiction all previously rent stabilized apartments which had been deregulated due to vacancy. The law also placed under rent stabilization all formerly rent controlled apartments which had been decontrolled. ETPA left standard rent control in place for tenants in continuous occupancy since 1971, decreeing that such apartments would become decontrolled only upon vacancy by the controlled tenant. Upon such event, ETPA directs the apartment's transfer to the Rent Stabilization system.

By virtue of ETPA's operation since 1974, New York City's rent stabilization system has grown from its original jurisdiction over 375,000 apartments to jurisdiction over more than 850,000 apartments. Standard rent control remains in effect for about 350,000

apartments as it is gradually phased out with each vacancy.

THE RENT STABILIZATION SYSTEM

The Rent Stabilization Law, like earlier New York rent-regulatory statutes, is grounded upon well established state regulatory powers, and is addressed to a well recognized public need. Yet the Rent Stabilization Law accomplishes its purpose through a system which is entirely distinct from systems established under precursor statutes.

One novel feature of the rent stabilization system is the real estate industry's participatory role subject to government supervision by means of an organized industry association both to fund the system's expenses and police its members' voluntary compliance. Interests of both owners and tenants are equally represented on the administrative arm of the system by providing for four representatives of tenants and four representatives of owners to serve on the quasi-judicial Conciliation and Appeals Board.

(The ninth member of the Board is appointed as the Board's impartial Chairman.) The law also ties rent to periodic review of special Bureau of Labor Statistics Studies of increases in operating costs in rental housing. Owners are thus afforded sufficient rental increases to properly maintain the property; tenants at the same time are protected form inordinate and unwarranted rent increases.

Every owner of a building covered by the Rent Stabilization Law is given the choice of voluntarily accepting the funding and self policing obligations (as well as benefits) of the rent stabilization system or being placed under the City's standard Rent Control Law. If the owner elects the rent stabilization system, he may collect automatic rent increases periodically (called rent guidelines increases) at lease renewal time. An additional vacancy allowance is permitted when renting to a new tenant. These guidelines increases are intended to

keep the owner whole—that is, to afford him the same financial return upon his investment which he received on the base date when the premises was on the free market. In return the owner is obligated by the Rent Stabilization Law to properly maintain his building and base date services and is barred from evicting the building's tenants without cause. The guidelines are City-wide percentages; where they prove inadequate, the law provides a hardship remedy to restore the owner to his base date free market financial posture.

The various functions of the rent stabilization system are performed by four separate and independent entities; each with different duties. Together they comprise the system. They are the Rent Guidelines Board, the Rent Stabilization Association, the New York City Conciliation and Appeals Board, and the Department of Housing Preservation and Development. The division of powers and responsibilities in each of these

four agencies (2 city, one public and one private) was designed to create a system of checks and balances.

The Rent Guidelines Board is the rate making arm of the system. It is a city agency comprised of two owner representatives and two tenant representatives and five public representatives from whom its chairman is appointed. All of the members including the chairman are designated by the Mayor. It is the rate making arm of the system, meeting annually to review United States Bureau of Labor Statistics and other studies in order to establish new guidelines for leases in existence in the current year. The studies done for and by the Rent Guidelines Board are of costs for items laid down in statutory criteria: labor, fuel, real estate taxes, repair and maintenance, utilities, insurance and prevailing mortgage interest rates.

The industry association established to participate in the regulatory process is called the Rent Stabilization Association.

Owners of rent stabilized properties must join the Association in order to participate in the rent stabilization system. The joining is deemed voluntary because the owner has the alternative choice of standard rent control. The Industry Association is required by law to draft a Code of conduct for its members governing their relationship with their tenants vis-à-vis required services and other incidents of the tenancy. The Code must be consistent with the provisions and intent of the statute and the Code's provisions are subject to review and approval (or rejection) by the City's housing agency, the Department of Housing Preservation and Development. It is also required by law to enroll members, police their conduct and collect sufficient dues from them to defray the administrative costs of other branches of the system, particularly the Conciliation and Appeals Board which is the enforcement arm.

The Conciliation and Appeals Board is an independent, non-governmental public

agency; it serves as the quasi-judicial enforcement arm of the Rent Stabilization Law. It is responsible for resolving disputes between owners and tenants and processing tenants' and owners' applications for relief permitted under the law. The Board's duties include the hearing and determination of tenants' complaints alleging rent overcharges or reductions of services required to be provided, and owners' applications for rent increases based on hardship, and for permission to modify the method of providing services. It has the power to enforce the Law, Code and its decisions by fine, discipline or other sanction and in extreme cases by expulsion from membership in the Rent Stabilization Association which automatically places the apartment or building (as the case may be) under standard rent control, considered a stricter form of regulation. The Board's nine members (four tenants' representatives, four owners'

representatives and the impartial Chairman) are appointed by the Mayor and subject to approval by the City Council.

Finally, the City housing agency, known as the Department of Housing Preservation and Development has overall supervisory authority over the operation of the rent stabilization system because the Statute confers on it the power to review and mandate changes in the regulatory Code drafted by the industry, power to discipline the industry association as a whole (as opposed to actions of individual members which are subject to review and discipline by the Conciliation and Appeals Board) and to police the industry's application of dues collected to insure its use for legitimate costs of running the system.

The separate functions performed by the four branches of the system together comprise the law's administration. While it may seem complex to divide these duties among separate branches, in practice it has

produced a reasonably satisfactory operation, given the highly charged atmosphere generated in this particular field of regulation.

FACTS PERTAINING TO THIS APPEAL

The appellant is the owner of a luxury apartment building located at 750 Park Avenue on the Upper East Side of Manhattan, New York. There are 62 dwelling units in the building; all of which are subject to the Rent Stabilization Law of New York City as amended by the ETPA of 1974.

When the Rent Stabilization Law became law on May 12, 1969, the owner joined the Rent Stabilization Association, thus placing the premises under stabilization rather than standard rent control.

Once the building became rent stabilized, the free market rents which the owner had charged before the law took effect became the initial stabilized rents upon which future increases would be calculated (the law took effect on May 12, 1969). At the same time all of the services which the owner provided in the building under free market conditions before the law took effect became "required services" which the owner

would be obligated to continue to provide so long as the building remained subject to rent stabilization (the law designated May 31, 1968 as the base date for required services).

During the time when the building was operated on the free market (including May 31, 1968) the owner protrayed the building to prospective tenants as a "full service" building, and, in keeping with the characterization, provided 24 hour manned elevator service. However, less than two years after the owner had joined the Rent Stabilization Association, he sharply curtailed the hours of this service without consulting with the tenants or seeking permission from the Board. Some of the tenants complained to the Rent Stabilization Association; one of the tenants filed a formal complaint with the Conciliation and Appeals Board. The complaint alleged that the curtailment of manned elevator service had resulted in a reduction in building security. After service on the

owner and processing of the case was completed including development of a full record on the issue, the Board issued an order and opinion on October 14, 1971 (Order Number 1545). In its ruling, the Board found that 24 hour manned elevator service was a required service, having been provided on the statutory base date. The Board's order further stated that the Rent Stabilization Law and Code prohibits the evasion of the lawful stabilized rent by, among other things, the modification of required services, and by virtue thereof, the Board directed the owner to restore the service in full.

The owner commenced a proceeding for judicial review of the Board's order pursuant to Article 78 of the New York Civil Practice Law and Rules. The Supreme Court of the State of New York, County of New York affirmed the Board's determination in all respects in Matter of Insjarl Realty Co. v. Conciliation and Appeals Board, N.Y.L.J., June 1, 1972, p. 17, col. 4 (Sup. Ct., N.Y.

Co., Spector, J.). Thereafter, the owner restored 24 hour manned elevator service in accordance with the Board's order and continued to provide the service until 1975.

However, in 1975, the owner served upon the tenants notice that he intended to completely eliminate manned elevator service at the building despite the outstanding order of the Board requiring full maintenance of this service. Thereupon the Board's Compliance Division served written notice upon the owner, advising him that he could not unilaterally eliminate services; that such action would constitute a willful violation of the Board's order and that if the owner wished to seek permission to alter services lawfully, the proper procedure would be to make application to the Board for approval.

The owner acknowledged receipt of the Board's warning but proceeded in disregard thereof to terminate manned elevator service without further notice, insisting he was

not "terminating" the service, but merely "substituting" another (i.e., mechanical devices instead of manned elevators). Thus, the owner asserted that he was fully meeting his obligations under the Board's 1975 order by substituting a closed circuit television monitor for elevator operators, claiming the monitors would provide the same level of security. Thus, the owner reasoned,his substitution of television cameras for elevator operators did not require the Board's approval notwithstanding the notice to him by the Board. The tenants thereupon filed a second formal complaint regarding this seeming disregard of the Board's directives.

An oral hearing was conducted (the decision to hold a formal hearing rather than determining the matter on the basis of written submissions rests within the discretion of the Board; such hearing is not required by statute). At the hearing, testimony was taken and documentary evidence

introduced under the supervision of the Board's hearing officer, and a tape recorded record was made of the entire proceedings. The proffered evidence showed the physical layout of the building—its various entrances, public areas, stairwells and elevators, i.e., the areas in which the building is vulnerable to intruders. The evidence also showed the various security-related services which each building employee provided before, as compared to after the elevator operators were dismissed, and the function which was currently being performed by the television monitor.

The owner appeared personally at the hearing and was represented by counsel. The owner's attorney called several witnesses to testify on the owner's behalf and to sponsor the introduction of documentary evidence. He also took the opportunity to cross-examine the witnesses who testified on behalf of the tenants. In addition, the

owner's attorney submitted lengthy memoranda setting forth in detail the owner's allegations of fact and legal arguments.

The evidence adduced at the hearing generated no material issue of fact. There was no dispute as to physical layout of the building, the employees' duties before and after the dismissal of the elevator operators, or the operation of the television monitor.

Based upon the entire record, the Board concluded that the measure of building security which was provided by the elevator operators was not compensated for by the installation of a television monitor. This conclusion was based in part upon the uncontroverted fact that the owner, in terminating manned elevator service, had reduced by one third the entire staff employed at the building, and that as a result all of the duties which had previously been performed by two full-time employees—the doorman and the elevator operator—had

been transferred to a single employee—the doorman. The Board found that all of the security related functions and other duties which were previously performed by the doorman and elevator operators could not possibly be carried out by the lone doorman, even with the help of a television monitor. Accordingly, the Board found that the owner's termination of 24 hour manned elevator service unlawfully diminished required services at the subject building.

The Board found that the owner's unilateral termination of 24 hour manned elevator service directly contravened the Board's earlier order which had been specifically addressed to this issue and which order had been challenged by the owner and affirmed in the Court. The Board voted that the owner's action also disregarded the notice warning the owner of such fact and directing him not to proceed as indicated. Accordingly, the Board found that the owner's violation was willful,

and, within its statutory authority, imposed a fine of $3,500.00. The Board directed the owner to forthwith restore manned elevator service.

PROCEEDINGS IN THE NEW YORK COURTS

The owner commenced a proceeding in Supreme Court, New York County for judicial review of the Board's order pursuant to Article 78 of the New York Civil Practice Law and Rules, obtaining an order from the Court staying enforcement of the Board's order pending hearing and determination of the proceeding in Court. The court subsequently dismissed the owner's petition in all respects, thus vacating the stay.

The owner then took an appeal to the Appellate Division, First Department and again secured an interim stay of the Board's order. In the Appellate Division, a panel of five justices unanimously affirmed the judgment of the lower Court without opinion which again vacated the stay. The same Court thereafter denied the owner's motion for reargument or, alternatively for leave to appeal to the Court of Appeals of the State of New York.

Finally, without seeking an interim stay, the owner made a motion for leave to appeal to the New York Court of Appeals (under New York

Appellate practice there is no appeal as of right from the order of an Appellate Division unanimously affirming the judgment of a lower Court). The New York Court of Appeals denied the owner's motion for leave to appeal. During this entire period, extending over a period of sixteen months, the tenants continued to be without this service.

SUBSEQUENT PROCEEDINGS BEFORE THE BOARD

Despite the expiration of the last Court ordered stay of the Board's order, the owner made no efforts to comply with the Board's direction that he restore manned elevator service, nor did he pay the fine. Many efforts were made by the Board's compliance division to obtain the owner's compliance. Finally, after more than four months of such efforts, the Board invoked its power to expell the owner from the Rent Stabilization Association (thereby placing the building under the jurisdiction of the Office of Rent Control), suspending the collection of guidelines rent increases, subject to a condition subsequent

that in the event the owner restored manned elevator service and paid the $3500.00 fine within seven days, such expulsion would not occur. The Board further found that the owner having collected full guidelines increases during this period without providing full services rewarded the owner improperly and therefore, the Board provided for compensatory rent reductions while manned elevator service was improperly withheld. Upon issuance of this, the Board's third order on the same issue, the owner finally paid the fine earlier imposed and restored the service.

APPLICABLE PROVISIONS OF THE RENT STABILIZATION LAW AND IMPLEMENTING CODE

The obligation of members of the Rent Stabilization Association to provide required services, including elevator and protective services, is based upon Section YY51-6.0, subdivision (c)(8) of the Rent Stabilization Law, which:

> "...requires members of the Rent Stabilization Association to maintain all services furnished by them on May thirty-first, nineteen hundred sixty-eight, in connection with the leasing of the dwelling units covered by this law..."

Pursuant to the above statutory provision, Section 62 of the Rent Stabilization Code was adopted by the Rent Stabilization Association, with the approval of the Housing and Development Administration (predecessor of the Department of Housing Preservation and Development) prohibiting the evasion of stabilized rents by modifying services provided or required to be provided to the tenants as follows:

"SECTION 62

> The stabilization rents and other requirements provided in this Code shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of dwelling units by requiring the tenant to pay or obligate himself for membership or other fees, or by modification of the practices relating to payment of commissions or other charges, or by modification of the services furnished or required to be furnished with the dwelling units, or otherwise." (Emphasis Provided).

Section 2(m) of the Code defines "required services" including protective and elevator services, as those services which were furnished or required to be furnished on May 31, 1968 and all additional services provided or required to be provided thereafter, as follows:

> "Section 2(m) 'Required Services': (1) that space and those services which were furnished or required to be furnished for the dwelling unit on May 31, 1968, and all additional services provided or required to be provided thereafter or with respect to a building subject to the RSL pursuant to Section 421 of the Real Property Tax Law, the date of issuance of the permanent Certificate

of Occupancy and all additional services provided or required to be provided thereafter. These shall to the extent so furnished or required to be furnished, include repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, telephone, elevator service, removal of refuse and janitorial services and ancillary services including but not limited to garage space and services, protective services and recreational facilities." (Emphasis Provided).

The Board's authority to impose sanctions upon members of the Rent Stabilization Association for their failure to fulfill their obligations under the Rent Stabilization Law and Code and orders of the Board is based upon Section YY51-6.0 subsivision b of the statute. Under this section each member of the real estate industry stabilization association is required to agree in writing to comply with the law and Code and abide by orders issued by the Conciliation and Appeals Board, as follows:

"(4) each member is required to agree in writing to comply with the Code and to abide by

orders of the Conciliation and Appeals Board; and (5) the association is of such character that it will be able to carry out the purpose of this law."

Section YY51-6.0 of the Law requires that the Code adopted by the real estate association include provisions which, inter alia, authorize the Conciliation and Appeals Board to impose such sanctions as fine, censure or termination of the owner's membership in the Rent Stabilization Association upon finding that the owner has violated the Rent Stabilization Law, Code or an order of the Conciliation and Appeals Board. This section states, in pertinent part:

"c. A code shall not be approved hereunder unless it appears to the housing and development administration that such code***

(10) specifically provides that if a member fails to comply with any level of fair rent increase established under this law or any order of the Conciliation and Appeals Board or is found by the Conciliation and Appeals Board to have harassed a tenant to obtain vacancy of his housing accommodation, he

shall not be a member in good standing of the association; (11) for any violation of the articles, code or other rule or regulation of the association, other than those specified in subparagraph (10) immediately preceding, members shall be appropriately disciplined by such sanction as fine or censure;***"

Sections 7 and 8 of the Rent Stabilization Code serve to implement the above statutory prescription, as follows:

"SECTION 7

A member shall forfeit his status as a member in good standing and shall have his membership with respect to the entire building or any dwelling unit therein suspended or terminated pursuant to an order of the CAB, in the event said Board determines that with respect to one or more dewlling units in the building he has either:

(a) willfully exceeded the level of fair rent increase established by the RSL, the Guidelines Board, or this Code. All charges in excess of the level of fair rent increases shall be deemed willful unless the member proves otherwise, or,

(b) has refused to abide by an order of said CAB within ten days of the date of issuance of such order, or

(c) has been found by the CAB to have harassed a tenant to obtain vacancy of his apartment."

"SECTION 8.

Any action of any member constituting a violation of the RSL or this Code other than a violation as described in section 7, shall result in such discipline, fine or sanction, as may be determined by the Board of Directors of the Industry Association or the CAB."

ARGUMENT

This case does not raise a substantial federal question warranting an appeal to the United States Supreme Court for the following reasons:

1. The Supreme Court has in previous opinions repeatedly and consistantly rejected the contentions made by appellant that rent regulatory laws in general constitute a taking without just compensation or an impairment of contract rights.

2. The Supreme Court has previously determined that no substantial federal question was raised by an appeal from an order of the New York Court of Appeals upholding the constitutionality of the Rent Stabilization Law, and the appellant has failed to cite any authority or evidence of record which calls for a different conclusion in the case at bar.

3. The appellant's due process rights were amply protected where he was afforded a full oral hearing at which he personally

appeared with counsel, presented the testimony of witnesses on his behalf, cross-examined all adverse witnesses, and made extensive written submissions setting forth his allegations of fact and legal arguments, and where the evidence adduced at the hearing presented no material question of fact to be resolved by the Board.

1. THE SUPREME COURT HAS REPEATEDLY CONSIDERED THE CONSTITUTIONALITY OF RENT REGULATORY LAWS, AND HAS CONSISTENTLY FOUND IN FAVOR OF THEIR VALIDITY.

The Supreme Court has upheld laws regulating residential rents against myriad constitutional challenges. In so doing, the Court has rejected the exact contentions made by this appellant and has held that such laws do not violate due process, Bowles v. Willingham, 321 U.S. 503, 517 (1944); that such laws do not deny equal protection, Woods v. Lloyd W. Miller Co., 333 U.S. 138, 145 (1948); that such laws do not effect a taking of property without compensation,

Block v. Hirsh, 256 U.S. 135 (1921); and such laws do not result in an impairment of contract rights, Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 198 (1920); Edgar A. Levy Leasing Co.v. Siegel, 258 U.S. 242 (1922). In the above cited cases, the Supreme Court established a principle which applies universally to all rent regulatory statutes—that the constitution does not bar the state from exercising its police power to protect the public welfare by regulating rents, services and evictions in residential dwellings. Thus, although these cases involved statutes which predated the Rent Stabilization Law, the principle established by the Court is nevertheless dispositive of the appellant's current challenge to the constitutional validity of the Rent Stabilization Law.

The questions which the appellant seeks to resurrect herein are: 1) whether rent regulatory laws constitute a taking of property without compensation and 2) whether

such laws constitute an impairment of contract rights. The Supreme Court's disposition of the question of taking without compensation is best expressed in the opinion of Justice Holmes in Block v. Hirsch (supra). In concluding that real property is not exempt from state regulation, Justice Holmes wrote as follows:

> "The fact that tangible property is also visable tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hundred feet. (citations omitted). These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent. We do not

> perceive any reason for denying the justification held in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing..." 256 U.S. 155.

With regard to the question of an impairment of contract rights, the Supreme Court's views were best expressed in its opinion in Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1933). In the Home Building case, Justice Hughes, in reviewing the Court's decisions involving rent regulatory statutes, concluded as follows:

> "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interest, have inevitably led to an increased use of the organization of society in order to protect the very bases of

> individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." 290 U.S. 442.

Thus, it is manifest that the Supreme Court has long since placed at rest any doubt that the state's exercise of its police powers to promote the public welfare through regulation of residential rents does not do violence to an individual's property or contract rights under the Constitution. Furthermore, the New York Court of Appeals has reached the same conclusion in numerous cases involving constitutional challenges to the rent control laws. Pitts v. McGoldrick, 103 N.Y.S.2d 875, aff'd 302 N.Y. 938, 100 N.E.2d 191 (1951); Gauthier v. Gabel, 44 Misc.2d 887, 255 N.Y.S.2d 200, aff'd 16 N.Y.2d 720, 262 N.Y.S.2d 105 (1965); Hartley

Holding Corp. v. Gabel, 13 N.Y.2d 306, 247 N.Y.S.2d 97 (1963); I.L.F.Y. Co. v. City Rent Administration, 11 N.Y.2d 480, 230 N.Y.S.2d 986 (1962); Bucho Holding Co. v. State Rent Comm., 11 N.Y.2d 469, 230 N.Y.S.2d 977 (1962); Teeval Co. v. Stern, 301 N.Y. 346 93 N.E.2d 884 (1950); Loab Estates, Inc. v. Druhe, 300 N.Y. 176, 90 N.E.2d 25 (1949) and Wasservogel v. Meyerowitz, 300 N.Y. 125, 89 N.E.2d 712. Hence, the appellant's effort to resurrect this dead issue through an appeal to the United States Supreme Court must fail. Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311.

2. **THE SUPREME COURT HAS PREVIOUSLY DETERMINED THAT NO SUBSTANTIAL FEDERAL QUESTION WAS RAISED IN AN APPEAL FROM AN ORDER OF THE NEW YORK COURT OF APPEALS UPHOLDING THE CONSTITUTIONALITY OF THE RENT STABILIZATION LAW.**

The Supreme Court has dismissed an appeal for want of a substantial federal question in a case involving a broadly based constitutional challenge in which the New York Court of Appeals had previously reviewed and upheld the constitutionality of the Rent Stabilization Law. Matter of 8200 Realty Corp. v. Lindsay, 27 N.Y. 2d 124, 313 N.Y.S. 2d 733 (1970) reversing 34 A.D.2d 79, 309 N.Y.S.2d 443 (1st Dept., 1970) and reinstating 60 Misc.2d 384, 304 N.Y.S.2d 384 (Sup. Ct., N.Y. Co., 1969, Gellinoff, J.) appeal dismissed for want of a substantial federal question 400 U.S. 962, 27 L.E2d 381, 91 S.C. 367.

The constitutional questions raised in the 8200 Realty case prompted the New York Court of Appeals to make a thorough analysis of the

statutory underpinnings of the Rent Stabilization Law, the reasons for its enactment, and the structure of the regulatory system created by the law. Upon completion of this comprehensive review, the Court of Appeals declared its conviction that the law was constitutionally sound.

The Court delved deeply into the legal and factual basis for the regulation of rents in post World War II buildings, and for the creation of a separate regulatory system in which owners participated and received more favorable treatment than under the Rent Control Law. The Court noted the reasons why post-war buildings were not previously regulated, but also observed that "by 1968 there was a rapid and radical change in the situation which created a serious housing crisis." In this regard the Court stated as follows:

> "The prior statutory scheme of rent control under title Y had left post-1947 housing rentals uncontrolled. It was assumed in 1962 and for some time thereafter that as to that type of housing,

the market, governed by supply and demand, would work reasonably and controls would be unnecessary. But by 1968 there was a rapid and radical change in the situation which created a serious housing crisis which the city felt obligated to meet." 27 N.Y.2d 136, 313 N.Y.S. 2d 742.

The Court went on to identify some of the conditions which evidenced a serious housing crisis in post war dwellings. The Court cited rent increases averaging 30% and reaching 60% and a housing shortage demonstrated by a vacancy rate in 1968 of 1.23%. Referring to an affidavit by Jason R. Nathan, the Administrator of the City's Housing and Development Administration (now called the Department of Housing Preservation and Development) the Court observed as follows:

> "The Nathan affidavit shows that commencing in the middle of 1968 a steadily growing volume of complaints were received by the city against increases in rent in the uncontrolled sector averaging 30%, and ranging as high as 60%, over pre-existing rents which were forcing large numbers of tenants to leave the city. Investigation disclosed that housing shortages had developed to the extent the vacancy rate had dropped from

> 3.19% in the spring of 1965 to 1.23% in the spring of 1968." 27 N.Y.2d 136, 313 N.Y.S.2d 742.

Noting that owners were active participants in the rent stabilization system and received more favorable treatment (i.e. financially) under this law, the Court found that this was a reasonable legislative means of encouraging new construction of dwellings, which the Court recognized as the "ultimate solution to the housing shortage." In this respect the Court held as follows:

> "It is clear that the differential in severity of control and the device of bringing the industry into a helpful role in regulation were both aimed at the 'ultimate solution to the housing shortage' which was the encouragement of 'new construction". 27 N.Y.2d 136, 313 N.Y.S.2d 742.

The Court went on to explain the basis for its conclusion through the following quotation from Mr. Nathan's affidavit:

> "In the post 1947 housing, although the housing shortage and landlord profiteering urgently required measures to halt the rent spiral, there was simultaneously widespead fear that the imposition of rent controls might delay the ultimate solution to the housing shortage by discouraging some

the market, governed by supply and demand, would work reasonably and controls would be unnecessary. But by 1968 there was a rapid and radical change in the situation which created a serious housing crisis which the city felt obligated to meet." 27 N.Y.2d 136, 313 N.Y.S. 2d 742.

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> landlords for hardship increases above fixed rentals. Although the association establishes this Board as part of the condition of approval and provides the funds for its operation, the Mayor appoints the members of the Board." 27 N.Y.2d 131, 313 N.Y.2d 738

The owner in 8200 Realty also argued that the role given the industry association to draft a regulating Code and police subject members also constituted an unlawful delegation of quasi legislative and quasi judicial powers. The Court rejected these contentions as follows:

> "[2] Whatever delegation may be said to have come down to the Real Estate Industry Association described in this statute, closely circumscribed and regulated as this is, no one could seriously entertain a fear that government has yielded any real sovereign power. Certainly no "legislative power" has been passed on under any possible conception of that term."
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> * * *
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> "The over-all supervision of the regulatory process is vested in the Housing and Development Administration which is expressly authorized to enact rules and regulations for the implementation of the statute (§YY 51-4.0, subd. c); to approve the code of an association (§YY 51-6.0, subd. b, par. [2]), and to discipline an association (subd. d)." 27 N.Y.2d 131, 313 N.Y.2d 738.
>
> * * *
>
> "The right of any member aggrieved

new construction. The compromise solution ultimately suggested by the Mayor and adopted by the New York City Council takes both factors into consideration. Thus the industry self-regulation pattern puts a brake upon run-away increases, but it does permit a great deal of freedom for landlords to increase rents within reasonable limits and thus to enjoy quite profitable operations of their properties..." 27 N.Y.2d 136, 313 N.Y.S.2d 742.

In addition to finding no constitutional infirmity in rent stabilization's more favorable treatment of owners, the New York Court of Appeals also upheld the Rent Stabilization Law against charges that it represented an unconstitutional delegation of quasi judicial enforcement powers to the Conciliation and Appeals Board. The owner had argued that the Board was not a public agency but an adjunct of the Industry Association (RSA) because it was wholly funded thereby. In rejecting that contention the Court of Appeals stated:

"The members of an association must also adhere to the limitations on rent increases fixed, as it has been noted, by the Rent Guidelines Board, and the Conciliation and Appeals Board has the power to hear complaints by tenants against landlords and requests by

Realty. Indeed, the appellant cites no case in which an appellate court has ever found any aspect of a rent regulatory law unconstitutional.

The appellant bases his constitutional challenge upon sweeping assertions such as: "...the law depends upon the existence of an emergency which did not exist at the time of the law's enactment and does not presently exist." (Jurisdictional Statement, page 4). Yet appellant has not brought to the Courts one iota of evidence showing that the legislatures of the City and State of New York were in error in finding that a housing emergency existed, warranting the passage of the Rent Stabilization Law.

Moreover, it is a matter of public record that the City Council's periodic review of New York City's vacancy rate and other factors concerning the housing market has been based upon a substantial body of objective, factual material.* Therefore, the Council's conclusion

*For example, when the City Council first enacted
(continue on next page)

(and that of the State Legislature in renewing the enabling legislation) that a housing emergency continues to exist in New York City requiring the continued regulation of rents in privately owned buildings with six or more rental units is reasonably and soundly grounded.

The State Enabling Act specifically provides that every three years the City Council must make a de novo evaluation of the continued need for regulation. The regulatory laws thus have a limited life. In accordance with the State legislature's mandate, the City of New York, prior to reviewing the expiring rent laws and the advisability of renewing or terminating same, engages the Bureau of the Census to conduct a special census survey of the City's rental housing stock. On the

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the Rent Stabilization Law in 1969, the Council had before it such documents as a report by the Bureau of the Census of the United States Department of Commence, released December 13, 1968 and based upon an investigation conducted between April 15, 1968 and June 15, 1968, as well as a report dated February 1969 by the Housing and Development Administration, Department of Consumer Affairs entitled Report to the Mayor on Investigation into Rental Increases in the Non-Controlled Housing Market.

basis of that census survey and testimony and data provided by recognized experts in urban housing, and concerned citizens (owner and tenant alike) the City Council decides whether a housing emergency still exists in the City of New York warranting the continuation of rent regulation for another period of time.

In light of the foregoing, the appellant's contention that the Rent Stabilization Law is unconstitutional on the ground that no housing emergency exists in New York City cannot be taken seriously.

Finally, in the Jurisdictional Statement the appellant, in calling upon the Supreme Court to hear and consider his proposition that the Rent Stabilization Law is unconstitutional, gives the impression that this contention was the locomotive which propelled him through the state judicial appeal system to the highest Court in the land. However, the truth is that in the New York Courts this constitutional argument invariably tagged along at the end of appellant's train of thought like a nearly forgotten caboose. Should the Supreme Court now show greater

enthusiasm for appellant's constitutional arguments than he himself was able to muster in lower courts? It is respectfully submitted that the answer is an unqualified "no". U.S. Fidelity and Guaranty Co. v. State of Oklahoma, 250 U.S. 111 (1919).

Significantly, the focal point of appellant's case in the New York Courts was the contention that the Board had erred in concluding that the owner was obligated under applicable statutory and Code provisions to continue to provide manned elevator service. This contention has been repeatedly heard and rejected by the Appellate Division, First Department in four cases involving nearly indentical facts to those in the case at bar, and the New York Court of Appeals has repeatedly refused to hear appeals in all of the cases of this nature in which leave to appeal has been sought. Matter of 75 East End Owners, Inc. v. Prince 61 A.D.2d 918, 403, N.Y.S.2d 166 (1st Dept., 1978) aff'g N.Y.L.J. April 18, 1977, p. 13, col. 2 (Sup. Ct., N.Y. Co., Helman, J.) motion for leave to appeal

denied 42 N.Y.2d 801 (1978); Matter of Sommer v. Prince, 59A.D.2d 535, 389 N.Y. 791 (1st Dept., 1976), aff'g N.Y.L.J., March 4, 1975, p. 13, col. 3 (Sup. Ct., N.Y. Co., Gellinoff, J.), motion for leave to appeal denied, 41 N.Y. 2d 801, 396 N.Y.S. 2d 1027 (1977); Matter of Century Operating Corp. v. Prince, —A.D.2d—, 415 N Y.S. 2d 1000 (1st Dept., 1978) aff'g N.Y.L.J., December 26, 1978 p. 12 col. 1 (Sup. Ct., N.Y. Co., Bloom, J.)(not otherwise reported); Matter of Century Operating Corp. v. Prince, —A.D.2d—, N.Y.L.J., October 1, 1979 p. 11 col. 3 (1st Dept., 1979) aff'g N.Y.L.J., December 2, 1977 p. 5 col 3 (Sup. Ct. N.Y. Co. Greenfield, J.)(not yet officially reported)

3. THE BOARD FULLY PROTECTED APPELLANT'S DUE PROCESS RIGHTS BY AFFORDING HIM AN AMPLE OPPORTUNITY TO BE HEARD.

The Board is under no obligation to hold hearings in cases arising before it; it may hold hearings or informal conferences within its sound discretion when the written record is not complete. In this case, a hearing was held. As to the adequacy of the owner's opportunity to be heard, the record speaks for itself. A cursory glance at the administrative record in this case compels the conclusion that the appellant was not only afforded ample opportunity to be heard, but he took full advantage of this opportunity. The appellant appeared at the hearing held at the Conciliation and Appeals Board with counsel, presented testimony of witnesses on his behalf, was afforded the right to and did in fact cross-examine adverse witnesses, and supported his testimony with extensive written submissions setting forth his allegations of fact and

legal arguments.

The evidence adduced at the hearing presented no material question of fact to be resolved by the Board. The physical layout of the building, the duties of the building employees before and after the dismissal of the elevator operators, and the function performed by the television monitor were all undisputed. The case boiled down to one question of law: whether the replacement of manpower to manually operate the elevators with closed curcuit television constituted the same base date service to which the tenants were entitled and for which they had been paying rent and rent increases over the years.

Appellant's argument that he was denied his constitutional right to be heard because the Board is beset by a heavy caseload and therfore might have been too busy to apprise itself of the appellant's allegations of fact and legal arguments in rendering its determination is not sustained

by even a cursory review of the record. The full Board reviewed the case; each and every document in the file was examined, not only by staff in presenting the case to the Board, but by a member of the Board assigned by the Chairman for such review. A written recommendation setting forth all salient facts including all of appellant's arguments and factual allegations was distributed to the entire Board a full week before the Board met to deliberate thereon.

Therefore, it is speculation on appellant's part that the Board did not have time to review the matter and a particularly unsavory kind of speculation at that. Such charge might be leveled at any judicial or quasi-judicial body which has its share or more of a heavy workload of public responsibility. The only true criteria for determining whether there was full deliberation, aside from a presumption of regularity, is the record and final order. In this case, the record and orders issuedby the Board

leave no uncertainty that this appellant was given full and thorough consideration.

Nor may appellant attack the procedures followed by the hearing officer assigned by the Board to conduct the hearing. None of the procedural requirements cited by the appellant are applicable to hearings at the Conciliation and Appeals Board. Since it is well settled that the Conciliation and Appeals Board is not required by law to even hold an oral hearing prior to the Board rendering a determination, it need not adhere to the technical procedural requirements suggested by appellant, procedures more appropriate to trials and/or formal hearings mandated by statute.

There is no statutory requirement that the Board conduct an oral hearing of the parties, and in the absence of such a requirement the Courts have uniformly held that the decision to hold an oral hearing rests within the discretion of the adminis-

trative agency. Due process requires only that tenants be afforded a reasonable opportunity to be heard. Matter of Friedman v. Conciliation and Appeals Board, N.Y.L.J., December 20, 1977, p. 5, col. 3 (Hughes, J.), aff'd.—A.D.2d—, 406 N.Y.S.2d 982 (1st Dept., 1978); Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1969); Matter of Knapp v. Altman, 29 N.Y.2d 588, 324 N.Y.S.2d 315 (1971).

The Federal Courts have also concluded that a satute which permits the administrative agency to determine within its discretion whether to hold an oral hearing of the parties or to decide a proceeding on written submissions is not violative of due process of law. In Matter of Mkwanznzi v. Kenray Associates, Inc. v. City of New York, Docket No. 68 Civ. 4116 (S.D.N.Y., 1969)(not officially reported), app. dism. 410 F.2d 1143 (2d Cir., 1969) the Federal District Court stated:

> "Due process does not mandate that an administrative hearing

> must be a triable-type evidentiary hearing. The type of hearing—trial, oral argument or written submissions—is best determined by the nature of the issues to be decided and in affect of the resulting orders. The general procedure followed by the Administration of deciding applications for rent orders or written submissions is not violative of due process.***"

So, too, Matter of Davenport v. Berman, 420 F.2d 294 (2d Cir., 1969), aff'g Docket No. 68 Div. 4984 (S.D.N.Y., 1969).

Furthermore, where the evidence adduced generates no triable issues of fact to be resolved by the administrative agency, due process does not require an oral hearing. Anti-Defamation League of B'Nai B'rith, Pacific Southwest Regional Offfice U.F.C.C., 403 F.2d 169, 131 U.S. App. D.C. 146, Certiori denied 89 S. Ct. 1190, 394 U.S. 930, 22 L.Ed.2d 459 (1968). In the Anti-Defamation League case, the Court held as follows:

> "Our examination of the record satisfies us that the Commission acted within its authority in denying an eviden-

> tiary hearing as to the undisputed facts which formed the basis for Appellant's claims. The disposition of Appellant's claims turned not on determinations of facts but inferences to be drawn from facts already known and the legal conclusions to be derived from those facts." 131 U.S. App. D.C. 148.

In this case a hearing was held and we believe the record amply demonstrates that said hearing, in keeping with the nature of the proceeding, was full and fair. By its conduct and the other opportunities afforded appellant to support its position with written submissions, the appellant was fully heard.

CONCLUSION

Wherefore, Appellee respectfully submits that no substantial federal question is raised warranting appellate review by the United States Supreme Court, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the order entered by the Supreme Court of the State of New York, Appellate Division, First Department.

Respectfully submitted,

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